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NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

THE NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 15, 16, 17, 18, 19, 21, 22, 23, 25, 28, 29, AND 30, 1987

ADDITIONAL SUBMISSIONS FOR THE RECORD

Part 5 of 5 Parts

Serial No. J-100-64

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

90-839 WASHINGTON : 1989

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, DC 20402

S 521-27

90-839 O - 89 - 1

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TESTIMONY

OF

ALTHEA T. L. SIMMONS

DIRECTOR/CHIEF LOBBYIST

WASHINGTON BUREAU, NAACP

ON

THE

NOMINATION OF JUDGE ROBERT H. BORK

FOR

ASSOCIATE JUSTICE OF THE

SUPREME COURT OF THE UNITED STATES

Mr. Chairman, and members of the Senate Judiciary Committee, I am Althea T. L. Simmons, Director of the Washington Bureau and Chief Lobbyist of the National Association for the Advancement of Colored People. I am appearing on behalf of the NAACP's half-million members in our 2100 branches in the 50 states and the District of Columbia.

The NAACP opposes the nomination of Judge Robert H. Bork. At our 78th Annual National Convention held in New York City in July, 1987, the delegates, as a first order of business, passed unanimously a resolution to oppose the nomination which said in part:

> "...the confirmation of Judge Bork would place on the High court a justice who does not feel constrained by precedent and who has favored a congressional limit on ...school desegregation techniques...the Supreme Court is too important in our thrust for equality and justice to permit us to sit idly by and watch a whole line of civil rights liberties be threatened by the appointment of a Justice whose ideological orientation would deprive us of the gains achieved in the last twenty years"
>
> Now therefore be it resolved, that the NAACP launch an all-out effort to block the confirmation of Judge Bork."

Mr. Chairman, it has been repeatedly reiterated during the course of Judge Bork's appearance before the Judiciary Committee that civil rights groups did not oppose Judge Bork when he was up for confirmation before. A question has been raised as to - "why now?"

The NAACP did opposed Judge Bork. I wish to excerpt from the testimony

of my illustrious predecessor and colleague, the late Clarence Mitchell, Jr. who in hearings before this Committee in 1977, on the nomination of Judge Griffin B. Bell as Attorney General, stated:

> "We, in the NAACP have been before this committee at other times in opposition to various nominees. The record shows the performance of nominees after they took office or after they were rejected by the Senate proved that our worst fears were confirmed.
>
> We opposed the nomination of Mr. Robert H. Bork to be Solicitor General of the United States. We were unsuccessful in defeating that nomination, and he became the chief architect of the outgoing administration's programs that were designed to undermine the guarantee of the 14th amendment in school desegregation cases. That proposal which came from the White House, is so bad that even the gentleman who ran with Mr. Ford as the Vice Presidential nominee said that he didn't think it had a snowball's chance in a very warm location.
>
> That is, indeed, what happened. It was assigned to limbo and not heard of again.
>
> But Mr. Bork seriously prevented it, and I am happy to say, as we told him in a conference 'We know what you are going to do to us, and that is the reason we opposed your nomination.' It is nice to be right.

Today, we oppose the elevation of Judge Bork from the Appellate Court to the U. S. Supreme Court. Many of our members and persons opposing the nomination are persons who have literally put their lives on the line to gain the freedom envisioned by the Constitution--a living Constitution. We have looked to the U. S. Supreme Court to interpret the Constitution inclusively. We believe that Judge Bork's views, as we interpret his public statements in articles, opinions, speeches and interviews, as being inimical to the gains made by our struggles for civil rights and individual freedom.

SENATE CONSIDERATION OF IDEOLOGY

The NAACP submits that the Senate can properly consider the ideology of judicial nominees. Professor Olive Taylor, of Howard University in a report, "Two Hundred Years, an Issue: Ideology in the Nomination and Confirmation Process of Justices to the Supreme Court of the United States submitted herewith, states:

> Ideology and ideological differences have consistently been at the core of the unfolding historical process of the American experience. It was over ideology that the American colonists broke from British rule. It was ideology that brought the Founding Fathers to Philadelphia in 1787 to form 'a more perfect union.' The structure of the new American government was based upon fundamental ideological questions concerning the nature of government, who shall govern and how the people shall be governed. Who shall make, execute, and interpret the laws of this land were and continue to be ideo-

> logical considerations. It was ideology that created political factions and political parties in this nation; and, indeed, it was over ideology relative to slavery and the locus of sovereignty that the nation was torn asunder in a bloody and brutal Civil War.
>
> Because it is the responsibility of the Supreme Court to expound the Constitution--the fundamental, organic law of the land--the ideological leanings of the Justices were and continue to be of foremost importance in the appointment and confirmation process. The Justices of the Supreme Court hold the power through their decisions to determine who and how the people shall be governed. And their decisions can and have affected the course of American history, and America's role in the concert of nations.
>
> As the final arbiter of the American constitutional system, the Court's opinions on the nature and scope of federal and state power, on the functions of the various departments of government, and on the meaning of the written language of the Constitution have built up a great body of living and growing constitutional law. Supreme Court opinions are universally accepted as the final word on constitutional questions.

The above-mentioned report documents how ideology has been a decisive factor shaping this country from its inception. Over the years, the Senate has given no less weight to ideology in deciding to confirm or not to confirm a Supreme Court nominee. The Senate has historically considered the ideology of a Supreme Court nominee in exercising its constitutional duty to give "advice and consent" to the President.

No less consideration should be given to ideology today. It is not "unAmerican" or "un-" anything else for the Senate to refuse to confirm Judge Bork to the Supreme Court solely because of his ideology.

The NAACP holds that Judge Bork does have an ideology. This is found in his prolific writings, speeches and public interviews.

Judge Bork has carved a pathway replete with his views on a number of issues which, if acquiesced to, could not only impact the course of social and economic history but have a profound unsettling effect on our lives for years to come..

Judge Frankfurter said it best that the Court has been from its inception the interpreter of the Constitution and thereby, for all practical purposes, "the adjuster of governmental powers in our complicated federal system."

According to Professor Olive Taylor:

> ...Ideology is the sine qua non of this unfolding process--[who shall govern, and how the people shall be governed, and the nature of the relationship of the Supreme Court to the people in expounding the Constitution] --and should be. To suggest that ideology not be taken into account in the judicial noination/confirmation process is not only unsupported by the historical record, it narrows the Senate's role in the assessment process of judicial nominees, thereby frustrating the concept of checks and balances so central to the Constitution. To look only at the professional credentials and judicial experience is not

> enough. It is like boarding a train because you like the masterful way in which the parts are put together without considering where the train will take you.

Judge Bork's philosophy is at substantial variance with numerous areas of settled constitutional law or court decisions. He still does not accept some established doctrines. He finds many settled court precedents unconstitutional in numerous areas and has publicly stated that a judge with his philosophy would have no difficulty overturning some of the court decisions. The NAACP submits, moreover, that the nominee lacks those very qualifications one looks for in a Supreme Court justice--the ability to use his legal skills to respond to the needs of the nation and its people--the judicial temperament or sensitivity to identify the needs of disadvantaged people--the openmindedness to grow and to change long-held views without having a carrot or reward before him.

JUDGE BORK AND ORIGINAL INTENT

Judge Bork said that his judicial approach is to follow the original intent of the lawmakers, be they the constitutional framers and ratifiers or legislators at the time a statute was passed by the Congress:

> How should a judge go about finding the law? The only legitimate way, in my opinion, is by attempting to discern what those who made the law intended. The intentions of the lawmakers govern whether the lawmakers are the Congress of the United States enacting a statute or whether they are those who ratified our Constitution and its various amendments.
>
> Where the words are precise and the facts simple, that is a relatively easy task. Where the words are general, as is the case with some of the most profound protections of our liberties--in the Bill of Rights and in the Civil War Amendments--the task is far more complex. It is to find the principle or value that was intended to be protected and to see that it is protected.
>
> As I wrote in an opinion for our court [the appellate court he sits on], the judge's responsibility 'is to discern how the Framers' values, defined in the context of the world they knew, apply in the world we know'. (Transcript of Hearings, Sept. 15, 1987, p. 117)

The NAACP recognizes that, as a general principle of constitutional or statutory interpretation, a judge should find out what the words mean. Where the words in the constitution or statute are clear and specific, then a judge is restricted in applying those words to the case. But where the words are unclear and general, then a judge has leeway to find out what the general words mean. To do so, a judge looks to the congressional debate, contemporaneous writings at the time the constitution or law was adopted and other sources of information to find out what the legislated words mean. But Judge Bork goes

further than merely defining the meaning of an unclear word, and that is disturbing to us.

Original Intent and Searching for Framers Values

Judge Bork's notion of original intent emphasizes a search for the framers values and applying those values to modern cases. He would look to the words of the statute or constitution, inject values into those words, and allow this to determine the outcome of a case.

This approach to judicial review of a case can be seen below:

> It is not the province of the Court to decide upon the justice or injustice of the policy or inpolicy of these laws. The decision of that question belonged to the political or lawmaking power, those who formed the sovereignty and framed the Constitution. The duty of the Court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it according to its true intent and meaning when it was adopted.

Unfortunately, that quote was used by Chief Justice Taney in the infamous Dred Scott case. That case upheld the legality of slavery by using original intent to a standard of judicial review of the case before the Court. The Chief Justice saw no legal basis to reach out, recognizing that slavery was immoral, and to outlaw slavery.

The fallacy of searching for the Framers or lawmakers "values" (expanding the simple statutory or constitutional interpretation of the meaning of a vague word) is laden with problems.

Original Intent and Government by the Majority - Majoritarianism

It is commonly accepted that lawmakers are sensitive to the views held by the people whem they consider constitutents. To the lawmaker, these constituents are the majority. throughout history, groups of persons were excluded from excercising the franchise--blacks, women, persons between the ages of 18 to 21 and others. Whether they were considered constitutents was dependent on the time a constitutional provision or statute was adopted. Views of these minorities, persons excluded from the right to vote, were subjected to acceptance or rejection by the majority.

Black citizens, long denied the right of the franchise, cannot accept Judge Bork's view of majoritanism.

Before Judge Bork was nominated to be an Associate Justice on the U. S. Supreme Court, Professor J. Clay Smith, Dean of the Howard University School of Law, eloquently disputed present day scholarly attempts to impute majoritarianism or super-majoritarianism into a standard of judicial review. His unpublished remarks, "A Response to Professor Robert B. Park's 'Giving Meaning

to the Constitution: Competing Visions of Judicial Review'" delivered June 12, 1987 before the District of Columbia Court of Appeals Judicial Conference, attached hereto, in full, include the following points:

> Second, we have an equally profound theoretical disagreement with Judge Bork concerning the balance to be accorded individual rights versus majority rule. Judge Bork expresses a bias favoring the least possible governmental intervention and the narrowest recognition of individual rights and protections in the Constitution. Notably none of Mr. Bork's writings articulate a theory for preserving or protecting the civil rights of minorities. Instead, he consistently rejects decisions that, arguably, protect minorities from the intolerance of the majority. Indeed Judge Bork favors the majority setting the important standards governing present and future relationships between the people and between the government and the people, without restraint of the Constitution and its guarantee of liberty to all.

The NAACP endorses Dean Smith's stated view of Judge Bork's support for majoritarianism. The breadth of his support can be seen in his writings, his speeches, his opinions and his constant search for the Framers or lawmakers "values". The NAACP sees the Judge subjectively claiming that a "value" was intended instead of using the established legal approach of finding out what vague, general or unclear words simply mean.

The practical problems with the Judge's selective adherence to the Framers values were revealed in lengthy discussions during his 1987 confirmation hearings with Senator Arlen Specter (R-PA). Throughout these discussions it became clear to us that Judge Bork is at variance with established principles of constitutional law and case law--desegregation of public schools in the District of Columbia as a result of Bolling v. Sharpe, modern forms of civil disobedience not inciting a clear and present danger as a result of Brandenburg v. Ohio and Hess v. Indiana as a result of his philosophy of original intent.

Original Intent and the 14th Amendment

Legal scholars posit that the words "no person shall be denied the equal protection of the laws", as stated in the 14th Amendment, are unclear and general in meaning. The 14th Amendment is the crux of many civil rights violations and the question is whom did the Framers intend to give equal protection to? Judge Bork testified, in response to a series of questions asked by Senator DeConcini (D-AZ):

> Well, let me talk about that Senator. In looking at the Fourteenth Amendment, race is the paradigm case. Race is the core of the Amendment. That is what the post-Civil War Amendments were basically aimed at. They wanted to help and prevent discrimination against the newly freed slaves. And of course, race and ethnicity--that is the way the Amendment was applied for a long time. It was applied to Chinese Americans in Yick Wo v. Hopkins. (September 15, 1987 Confirmation Hearings, Transcript, p. 210.)

Bork on Public School Desegregation in the District of Columbia - Bolling v. Sharpe

Judge Bork's original intent philosophy leads him to find no constitutional basis for the landmark decision, Bolling v. Sharpe (1954) outlawing public school segregation in the District of Columbia. The decision was based on the constitutional doctrine of substantive due process, a doctrine Judge Bork finds an improper one. In 1971, Bork wrote:

> It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process, revived by the Griswold case, is and always has been an improper doctrine. 1971 Indiana Law Journal, p. 11.

During his confirmation hearings, Judge Bork did not use Bolling to illustrate the substantive due process doctrine's "weakness", his responses to questions propounded reveals that, in 1987, he finds no constitutional basis for Bolling v. Sharpe. He still rejects the application of substantive due process even to a historical case of egregious racial segregation. In a colloquy with Senator Arlen Specter:

Senator Specter asked Judge Bork:

> But if you turn to due process and take your application of due process of law and what you have said about Griswold and Roe v. Wade, how can you justify Bolling v. Sharpe applying the due process clause to stopping segregation?

Judge Bork replied:

> I do not know that anybody ever has. I think that has been a case that has left people puzzled.

Sentor Specter continued:

> My time is up, but what I wasnt to come back to is how that (original intent) applies in other contexts, how that applies in equal protection. And if you are willing, as a Supreme Court nominee, to say that you sanction Brown v. Board of Education, and you sanctioned Bolling v. Sharpe on due process grounds, then it seems to me you are a significant distance from original intent (September 16, 1987 Confirmation Hearings, Transcript, p. 150)

Judge Bork responded:

> I do not think I am on Brown v. Board of Education.

Senator Specter then inquired about Bolling v. Sharpe and Judge Bork responded:

> I think there may be a significant difference there, and I did not say I sanctioned. I think that constitutionally that is a troublesome case.

In response to a point blank question by Senator Specter as to whether Judge Bork accepted Bolling v. Sharpe or not, the Judge responded:

> I have not thought of a rationale for it because I think you are quite right, Senator.

When Senator Leahy queried, "You say you have or have not?", Judge Bork answered:

> Have not. Ibid, p. 152

Throughout the discussion, Senator Specter's concern was that the Supreme Court in Bolling v. Sharpe was able to meet the needs of the nation. The critical issue is that, given Judge Bork's philosophy of applying neutral principles and original intent, how will he be able to meet the needs of this nation, especially people whose views or needs are not shared by the majority, The NAACP is troubled by the fact that Judge Bork rejects constitutional doctrines used by the Court to meet the needs of the times. The Judge would, selectively, follow the original intent of the Framers or their values. It is our opinion that the Framers clearly did not intend to instill into the constitution fundamental notions of integration, equality between the races, and other constitutional concepts developed over the years.

Dean J. Clay Smith of the Howard University Law School in addressing the question, how is the Constitution of the United States to be interpreted as relates to the interests of Black Americans, opined that it is not solely by reference to the written sources of law (the Constitution or other contemporary documents). Legal rights given to Black Americans and many others who have faced discrimination come about by the law in operation:

> The decision by the Framers to allow slavery after the ratification of the United States Constitution was a moral flaw in the Constitution. It was morally wrong...
> "Toward Pure Legal Existence: Blacks and the Constitution",
> (Paper presented by J. Clay Smith, Jr., on June 18, 1987 at the New York City Schomburg Center for Research in Black Culture)

It is the opinion of the NAACP that the values of the Framers are not decisive in determining the meaning of vague constitutional words, or in determining whether claimed rights are constitutionally protected. They are also not decisive in controlling the outcome of a case reviewed by a Supreme Court Justice.

Original Intent and the Right of Privacy

Judge Bork is critical of the right to privacy as articulated in the landmark case of Griswold v. Connecticut which overturned a Connecticut statute making it a crime for doctors to distribute contraceptives. Mr. Bork criticized this constitutional doctrine in his now much-quoted Indiana Law Journal (p. 7-11) in 1971:

> Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. (p. 8)

Judge Bork wrote about Griswold:

> The Griswold decision has been acclaimed by legal scholars as a major advance in constitutional law, a salutary demonstration of the Court's ability to protect fundamental human values. I regret to have to disagree..., id., p. 8

Although the above quote was written in 1971, Judge Bork, in 1987, still maintains that judges should be limited to the values of the Framers.

Since 1971 a body of constitutional law has been developed to protect reasonable expectations of privacy where the Constitution does not specifically spell out a right to be free from intrusion into an individual's private affairs.

The Fourteenth Amendment - Overview and Importance in Advancing Civil Rights

Many Black Americans rests their hopes, aspirations and belief in the Constitution of these United States on the 13th, 14th and 15th Amendments to the Constitution. The Fourteenth Amendment has become the centerpiece in the drive to gain equal rights through its three main clauses: equal protection, due process, and privileges and immunities. The Amendment also includes a provision authorizing Congress to enact legislation reasonably necessary to accomplish the purposes of these clauses. Using this authority, the Congress has enacted several post civil rights laws --42 U.S.C. §1871, 1873 and related criminal provisions in the federal criminal code; 18 U.S.C. §242. Several modern civil rights laws--the Civil Rights Act of 1957, the Civil Rights Act of 1960, the Civil Rights Act of 1964; (the Voting Rights Act of 1965 also refers to the 14th Amendment); the Civil Rights Act of 1968--all to give substantive everyday meaning to the Amendment.

Numerous treatises have been written citing the myriad cases decided under the equal protection clause. The results of high Court interpretation of the the 14th Amendment can been seen in a wide range of decisions, many of them brought by the NAACP. They include: the education decisions, notably: Sweatt v. Painter, McLaurin v. Oklahoma State Regents, Briggs v. Elliott, Brown v. Board of Education, Cooper v. Aaron, Swann v. Charlotte-Mecklenburg County Board of Education, Keyes v. Denver, Milliken v. Bradley.

Equality and nondiscrimination against lack Americans was advanced under the 14th Amendment and applied in the most intimate of personal decision in Loving v. Virginia (marriage), Skinner v. Oklahoma (sterilization), and Palmore v. Sidoti (child custody).

Equality in criminal justice for lack Americans was advanced, under the 14th Amendment, in Chambers v. Florida (coerced confessions), Haley v. Ohio the Scottsboro case--Powell v. Alabama (right to effective counsel), Screws v.

United States, and the historical use of 18 U.S. C. §242 in cases to hold people criminally responsible for lynching black Americans.

Equality in housing opportunities for black Americans was advanced using the 14th Amendment in Shelley v. Kraemer and Barrow v. Jackson, Reitman v. Mulkey and Jones v. Alfred Mayer.

Equality for blacks in the armed services was advanced in Reid v. Covert, Burns v. Wilson, Wilson v. Girard where it was made clear that constitutional standards of equality or justice applies even in the military.

Equality in the ability of black Americans to earn a living was advanced using the Fourteenth Amendment, in Harvey v. Morgan (professional boxers), Dorsey v. State Athletic Commissioners (baseball players), Chaires v. City of Atlanta (barbers), Sweatt v. Painter (lawyers), Conley v. Gibson, Brotherhood of Railroad Trainmen v. Howard, to mention a few.

Equality in voting rights for black Americans was advanced under the 14th Amendment notwithstanding the Fifteenth Amendment. Even the legislative history of the Voting Rights Act of 1965 spoke of the 14th Amendment as a constitutional basis for the Act. The 14th Amendment was used to gain access to voting ballots by removing barriers of white primaries and poll taxes (United States v. Alabama, Harper v. Virginia Board of Elections, United States v. Texas); literacy tests were addressed in Harman v. Forssenius, and apportionment was the issue in Katzenbach v. Morgan.

The Fourteenth Amendment has been used by non-black Americans to make strides toward equality:

- Australians were protected as a result of a 1915 decision in Traux v. Raich which held that people in the United States who are not citizens, aliens cannot be denied equal protection of the laws.

- Japanese Americans were held to be entitled to equal protection of the laws in Takahashi v. Fish & Game Commission.

- Mexican Americans advanced toward equality as a result of the decision in Hernandez v. Texas.

- Chinese Americans advanced toward equality as a result of the decision in Yick Wo v. Hopkins.

- Women advanced toward equality as a result of decisions in Frontiero v. Richardson and University of Mississippi v. Hogan.

Equal protection of the laws has been extended to people with handicapping conditions, illegitimate children, the elderly etc.

All Americans moved toward equality under the 14th Amendment to the Constitution. Mr. Chairman and members of the Committee, it is inescapable that the 14th amendment to the constitution has affected the lives of all Americans. that is why the NAACP believes that a deep inquiry into Judge Bork's views about the protection given to individuals under the 14th Amendment is critical, for black Americans and all Americans.

Bork's Controversial View - Who is Protected by the Fourteenth Amendment

In 1971 Judge Bork wrote that only blacks were protected from governmental discrimination under the 14th Amendment and he articulated a narrow view of the kind of discrimination which is prohibited. He wrote:

> The equal protection clause has two legitimate meanings. It can require formal procedural equality, and because of its historical origins, it does require that government not discriminate along racial lines. but much more than that cannot properly be read into the clause. 1971 Indiana Law Journal, p. 11.

Judge Bork's pre-confirmation hearings posture was that only racial discrimination was prohibited by government. He clearly held that the opinion that discrimination against women, illegitimate children, handicapped people and aliens was not intended to be outlawed by the 14th Amendment. Judge Bork reiterated this view in his March 31, 1982 speech at Catholic University, his August 13, 1985, speech at the Aspen Institute and reaffirmed it during a Worldnet Interview when he stated:

> I do think the equal protection clause probably should have been kept to things like race and ethnicity.

Those statements reaffirmed his earlier views that women and many other categories of individuals are not protected under the equal protection clause; therefore discrimination against them is given lesser scrutiny than the statutes or governmental action of racial discrimination. He modified his position during his 1987 confirmation hearings.

Bork's Controversial View - Standard Used by Judges to Outlaw Discrimination

The crux of the NAACP's disagreement with Judge Bork centers on what standard or test judges are to use to decide if a person has been denied equal protection of the laws. If the standard is lenient, then state action is likely to be upheld, whereas if the standard is strict or rigorous state action is likely to be unconstitutional when individuals claim they have been denied equal protection. During his 1987 confirmation hearings, Judge Bork testified:

> The fact is a reasonable basic approach which rejects artificial distinctions and discriminations would arrive at all of the same results, I think, or virtually all of the same results that a majority of the Supreme Court has arrived at using a group approach and an intermediate level of scrutiny approach. There is really no difference in anything except the methodology, but women are covered, every person is covered by the equal protection clause.

Over the years, the Supreme Court has acknowledged that it is not sufficient to merely use a reasonableness test for judges to determine that racial discrimination is constitutional. Instead the Court has developed what is termed a "strict scrutiny" test to allow the most rigorous analysis or review by judges in deciding if racial discrimination is unconstitutional. Judge Bork would not use this strict scrutiny test, but would merely use a reasonableness test, even for racial discrimination.

Mr. Chairman, and members of the Committee, the NAACP has real problems with the Judge's position that a reasonableness test be used for racial discrimination as opposed to the current "strict scrutiny" test. We submit that the Bork view is not accepted constitutional doctrine. Professor Lawrence Tribe in testifying before this Committee on the nomination said:

> With all respect, that formulation [of reasonableness] accomplishes nothing.

Tribe attested to the use of the reasonableness standard, which Judge Bork supports, to uphold discrimination, e. g. Plessy v. Ferguson, setting forth the "separate but equal" doctrine authorizing racial discrimination; Bradwell v. Illinois authorizing the exclusion of women from practicing law; Hoyt v. Florida authorizing the exclusion of women from sitting on jury service and Goesaert v. Cleary authorizing only the wives and daughters of male bar owners to work as bartenders and discriminating against other women.

Bork's Controversial View - "Bright Line or Predictability

Judge Bork is critical of judicial doctrines which do not clearly articulate a "bright line" or allow predictability on what is unconstitutional and what is not. One the one hand, he criticizes the right to privacy saying that the Supreme Court's articulation of that right leaves judges and lawyers with no bright line as to what is protected and what is not, yet his articulated test of reasonableness under the equal protection clause of the 14th amendment has no bright lines either on what is protected and what is not.

Criticism of the Civil Rights Act of 1964

In the trying years of the early 1960's when black Americans were trying to desegregate public places, Judge Bork announced his opposition to the public accommodations sections of the draft bill (which later became Title II of the Civil Rights Act of 1964. Judge Bork wrote:

> Passions are running so high over racial discrimination that the various proposals to legislate its manifestations out of existence seem likely to become textbook examples of the maxim that great and urgent issues are rarely discussed in terms of the principles they necessarily involve. In this case, (with Title II) the danger is that justifiable abhorrence of racial discrimination will result in legislation by which the morals of the majority are self-righteously imposed upon a minority...
>
> We are treated to debate whether it is more or less cynical to pass the law under the commerce power or the Fourteenth Amendment, and whether the Supreme Court is more likely to hold it constitutional one way or the other...The discussion we ought to hear is of the cost in freedom that must be paid for such legislation, the morality of enforcing morals through law, and the likely consequences for law enforcement of trying to do so.
>
> Few proponents (of Title II) seem willing to discuss either the cost in freedom which must accompany it or why this particular departure from freedom of the individual to choose with whom he will deal is justified...
>
> There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent...Of the ugliness of racial discrimiantion there need be no argument (though there may be some presumption in identifying one's own hotly controverted aims with the objective of the nation) But it is one thing when stubborn people express their racial antipathies in laws which prevent individuals, whether white or Negro, from dealing with those who are willing to deal with them, and quite another to tell them that even as individuals they may not act on their racial preferences in particular areas of life.

There is no doubt that Robert Bork opposed Title II at the time it was being considered by the Congress and when the kinds of racial discrimination it outlawed was occurring daily. After his article ["Civil Rights - A Challenge" The New Republic, p. 21] was attacked, Bork defended his position in a letter to the editors of The New Republic magazine ["Civil Rights - A Rejoinder," The New Republic, September 21, 1963, p. 36] and repeated his opposition in an article. "Against the Bill" in the March 1, 1964 Chicago Tribune.

Mr. Chairman, and members of the committee, you will recall that during these hearings, several Senators questioned Judge Bork on his opposition to Title II, and in response to a query put by Senator DeConcini, Judge Bork stated:

> What I said was I was discussing the principle. It (the article) starts off by saying of the ugliness of racial discrimination; there need be no argument. Then I went on to talk about this bill which forced association which worried me at the time, it does not worry me now, not at all; it was a good idea. I said the principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about

> adopting my view of the situation, I am justified in having the state coerce you into more righteous oaths. That is what I said was the principle of unsurpassed guliness. It was the principle I thought was underlying this thing, which was a principle that can apply much more broadly."

During these hearings, Judge Bork insisted that he no longer opposes Title II

Mr. Chairman, and members of the Committee, the crucial questions for the NAACP and many black Americans are:

- Will Judge Bork be fair. Can we trust his recantations?
- If he is confirmed and is elevated to an Associate Justiceship is he free to further the philosophy he has been evolving for more than two decades?

The NAACP feel discomfort at the idea of Judge Bork's sitting on the High Court. We are not reassured by his confirmation conversion. We believe that Judge Bork is totally committed to the philosophy he has been articulating over the years. We are consciously aware of his activity as Solicitor General as well as the well-known proclivity of our President to attempt to erode the rights of minorities and to place ideologues on the various federal benches. It was that knowledge that energized large numbers of black Americans to turn out in large numbers to vote in the last general election to help change the control in the Senate. Black Americans are concerned with what this Administration is doing with the nation's courts. We fear a repeat of what happened after Reconstruction when the U. S. Supreme Court started narrowing its interpretation of the U. S. Constitution and the protections guaranteed by the 13th, 14th and 15th Amendments.

Judge Bork said to this Committee, in so many words, that his writings were "professorial musings" and part of a professor's role is to be provocative, etc--that we ought to take a look at what he has done in his five and one-half years on the appellate court. We have. The NAACP had first hand experience with Judge Bork when he was Solicitor General. That experience adds to our concern.

The nominee, in his statement to this Committee, noted that his professional career has spanned four major areas of the law-- private practice, the academic world, government experience, and the judiciary. He also concluded:

> I have a record in each of these areas of the law and it is for this Committee and the Senate to judge that record.

We agree, with the nominee, that it is the responsibility of this Committee and the Senate to judge that record. We urge this Committee to peruse that carefully and ask yourselves, as you attempt to stand momentarily in the shoes of black Americans: Should black Americans discount over two decades of writings, speeches and critiques against major Supreme Court and/or congressional decisions/actions, and accept the this week confirmation assurances of Judge Bork regarding the rights of mincrities, women, etc.

My predecessor Clarence Mitchell said, once in testimony before this Committee on an Attorney General nominee: If you had a precious jewel [freedom] in a museum and there was an individual identified as removing the jewel and putting it into a place where it was not recoverable by the museum; and then the remover of the jewel said he was sorry he removed the jewel and promised never to repeat the act. Clarence said that, you might believe the remover of the jewel, but the critical question is:

Would you hire him as night watchman in the museum.

The NAACP submits that Judge Bork is deeply wedded to his philosophy re original intent and other constitutional issues. We believe that, once on the High Court, he would attempt to have the law shaped to his liking. As a matter of fact, he stated in response to a question on judicial activism:

> No human being can sit down with words in a statute with history and the other evidence he uses, and not to some extent get his personal moral view into it, because each of us sees the world, understands facts, through a lens composed of our morality and our understanding [Transcript of Hearing, p. 222, lines 2-7]

Judge Bork on the Record [Civil Rights Record]

On March 24, 1966, the United States Supreme Court decided, in Harper v. Virginia board of Elections, that the Virginia poll tax violated the United States Constitution by requiring the payment of a $1.50 tax as one of the conditions to voting in elections. The Court in Harper said:

> We conclude that a State violated the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or paying of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. 16 L. Ed. 2nd at 172.

In testifying for his confirmation as Supreme Court Justice, Judge Bork said he still thinks the case was wrongly decided. In responding to a query by Senator Kennedy as to whether he had changed his views that the Supreme Court was wrong in the Harper case to hold that poll taxes are unconstitutional, Judge Bork responded:

> I think it was [the Court was wrong] and I will tell you why, and I have no desire to bring poll taxes back into existence. I do not like them myself. But if that had been a poll tax applied in a discriminatory fashion, it would have clearly been unconstitutional. It was not. I mean, there was no showing in the case. It was just a $1.50 poll tax. id, pp 198.

That is exactly what the Supreme Court found in the Harper case:

> Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the State from fixing voter equalifications which invidiously discriminate." 10 L. Ed. 2nd at 172.

The right to vote cannot be conditioned upon payment of a state poll tax. Money itself, in short, was the invidious discrimination. No matter how large or small, the tax was imposed by the State.

Judge Bork further testified why he still, in 1987, thinks the case was wrongly decided by the High Court:

> This Congress had just recently drafted and proposed to the states and had adopted an anti-poll tax amendment to the constitution which this Congress carefully limited to Federal elections so as to leave state poll taxes in place if states chose to have them. That seemed to me a little odd, therefore, that the Court would come along and mop up something that Congress did not bother to amend the Constitution to accomplish.
>
> The poll tax was familiar in American history and nobody ever thought it was unconstitutional unless it was racially discriminatory. id. p. 198.

The Virginia poll tax was racially discriminatory, yet Judge Bork said there was no argument made in the Harper case that the tax was racially discriminatory. In the Court's opinion in Harper, the Court footnoted:

> We recently held in Louisiana v. United States, 380 U. S. 145...that a literacy test which gave voting registrar's virtually uncontrolled discretion as to who should vote and who should not had been used to deter Negroes from voting and accordingly we struck it down. While the 'Virginia poll tax was born of a desire to disenfranchise the Negro' [citing this finding in Harman v. Forssenius, 380 U. S. 528, 543) we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end.' id. p. 172

After that decision was struck down, a lower court struck down the poll tax in U. S. v. State of Mississippi. The poll tax was also invalidated (for different reasons) in U. S. V. State of Alabama.

One Man - One Vote - Reynolds v. Sims & Baker v. Carr

In 1968, Mr. Bork wrote in a Fortune magazine article, "on no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed." In 1971, he wrote extensively in a law review article that these cases were wrongly decided. In 1973, Mr. Bork testified

that he "did not think that there is a theoretical basis for it [one man, one vote]. In 1987, Judge Bork continues to think that the landmark Supreme Court decisions establishing the election principal of "one man, one vote" have no constitutional basis or were wrongly decided. On June 10, 1987, Judge Bork publicly stated in an interview:

> Well, I think this Court stepped beyond its allowable boundaries when it imposed one man, one vote under the equal protection clause.

He went on to explain his position to this body stating:

> A state should be free to apportion as it sees fit, so long as the apportionment plan has rationality and so long as a majority has a way to change the apportionment whenever it wants to. That seems to be my point... ibid, p. 201.

Judge Bork would defer to the democratic process for the legislators to act, without judicial prodding rather than accept the Court constitutional basis for one man , one vote:

> Well, Senator, if the people of this country accept one man, one vote, that is fine. They can enact it any time they want to. ibid, p.202

Mr. Chairman, we are all too aware that state legislators do not, by and large, redisdtrict on their own. Former Congresswoman Barbara Jordan, during these hearings, eloquently testified regarding her personal experience in running for the Texas State Senate twice before the Supreme Court issued its landmark decision. The difference between Barbara Jordan's winning and losing a seat in the Texas State Senate was the Supreme Court's decision on reapportionment according to one man, one vote. Yet, Judge Bork does not see the "one man. one vote" case as a civil liberties case:

> Senator Kennedy, I do not think your characterization of one man, one vote as a civil liberties case is corrent. In fact, I think it is the opposite. But we can discuss that at greater length. ibid, p. 204.

The NAACP does not object because we see cases differently than he does. Our objection is more fundamental. These two cases are about people--opening up the democratic processes to people who have been under-represented. Mayor Andrew Young of Atlanta eloquently testified about how the Supreme Court hears the cry of people--that the Court is not about principles or cases. Mr. Chairman, and members of the Committee, the NAACP submits that it is people like Congresswoman Barbara Jordan and countless others who have had to turn to the Court when state legislators fail to act who are protected by the one man, one vote decision. We do not

find assurance that Judge Bork will accept the wisdom of these reapportionment decisions.

We are not unmindful that Judge Bork point out hov he worked on redistricting in Connecticut to satisfy the principle of one man, one vote. We must point out, however, that in so doing he was operating under the legal principle set forth by the Supreme Court, whereas today he is being considered to be a member of that august body--a body which has the responsibility for interpreting the Constitution and making the legal principles for others to follow. The NAACP submits that there is a big difference in one following the law and one helping to make the law.

Katzenbach v. Morgan

Judge Bork remains critical of the Katzenbach decision. In his testimony before this committee, in response to Senator Orrin Hatch's characterization of Katzenbach:

> ...is it a case where the Supreme Court upheld a Congressional statute that redefined the words of the Constitution itself as I view it. Is that a fair characterization? id, September 17, 1987 Transcript of Hearing, p. 68.

Bork replied:

> That is exacly what happened, Senator...congress did not overturn all literacy tests. It overturned literacy tests in particular kinds of cases. But they were, as you non-discriminatory...
>
> Now Congress can participate in changing the Constitution, but it does so by proposing an amendment to the Constitution which must go to the states. ibid, pp 63,69, 72

When Senator DeConcini asked him about the references he made in his 1971 article to the Voting Rights Act being bad, Judge Bork testified:

> I was not saying that the banning of literacy tests was bad by the courts. id. September 16 Transcript, p. 69.
>
> I said here in this testimony that I agree with the dissent in Katzenbach v. Morgan. And the reason I agreed with the dissent was that the majority said that Congress by statute could change a rule the Supreme Court had laid down. The Supreme Court had held that non-discriminatory literacy tests were constitutional. Congress passed a statute [the Voting Rights Act] which in certain circumstances says they are outlawed. And the Court said the Congress can define equal protection clause in some ways. ibid, p. 70

When Senator DeConcinci asked if Judge Bork used the same reasoning in opposing the Civil Rights Act, Judge Bork replied:

> No, No...the 1963 article in the New Republic is not a constitutional article. This was simply political philosophy, and it was very bad political philosophy ...

But my views on Katzenbach v. Morgan have not changed. I do think that the Congress of the United States can change the Constitution by statute. id., September 16, p. 71

Bork's Support of Nixon's Anti-Busing bill

We are perplexed by Judge Bork. On the one hand he says he opposes congressional action to limit the jurisdiction of federal courts [one of the reasons given for his opposition to the human life bill], yet he supported congressional action to limit the remedies which Federal courts could order to desegregate the nation's public schools.

In 1971, the Nixon Administration introduced first the Student Transportation Moratorium Bill, to make it illegal for any federal court or agency to issue a busing order until after July 1, 1973. Later the Equal Educational Opportunities Act of 1972 was introduced. This measure would have fixed the time periods for school desegregation orders. Both measures were designed to limit the reach of the U. S. Supreme Court'd decision in Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1 (1971). Mr. Bork was one of only two law professors who testified that the anti-busing bill was constitutional. Over 500 law professors had said the bill was unconstitutional. Even in 1972, Judge Bork was outside the mainstream with reference to the Constitution.

Unfounded Constitutional Basis for Landmark Supreme Court Cases

Judge Bork continues to believe that the landmark case of Shelley v. Kraemer, 334 U. S. 1 (1948) which held that racially restrictive covenants are unenforceable in state courts, was wrongly decided and without a constitutional basis.

In 1971, in the much quoted neutral principles article, Bork said:

> I doubt, however, that it is possible to find neutral principles capable of supporting some of the other decisions... An example is Shelley v. Kraemer...The Principle would apply...to any situation in which the person claiming freedom in any relationship had a racial motivation.
>
> That much is the common objection to Shelley v. Kraemer, but the trouble with the decision goes deeper...This attempt to rehabilitate Shelley by applying its principle honestly demonstrates rather clearly why neutrality in the application of principle is not enough...It converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion. 1971 Indiana Law Journal, pp 15-17.

Judge Bork claims:

> In fact, Shelley v. Kreemer has never been applied again. It has no generative force. It has not proved to be a precedent. As such, it is not a case to be reconsidered. It did what it did; it adopted a principle which the Court has never adopted again. And while I criticized the case at the time, it is not a case worth reconsidering. ibid.

the NAACP contends that Shelley has been applied not only in housing cases with racially restrictive covenants, but also in other cases to reach equally repugnant racial discrimination by private individuals or organizations. The priniples of Shelley are contrary to the core of Judge Bork's judicial philosophy as is attested to by his statement to this committee during his confirmation hearings in 1987:

> The difficulty with Shelley was not that it struck down a racial covenent, which I would be delighted to see happen, but that it adopted a principle which, if generally adopted, would turn almost all private action into action to be judged by the Constitution. Sept. 15, 1987, id., p. 126.

Professor Lawrence Tribe testified:

> Contrary to Judge Bork's assertion that the Shelley precedent 'has never been applied again', it has in fact been applied--in many later decisions, including one by then - Justice Rehnquist writing for a Court unanimous on this issue, in Moose Lodge v. Irvis, 407 U. S. 163 (1972) [see written testimony of Professor Tribe, p. 21]

Former Transportation Secretary William Coleman testified that Bork argued a more restrictive view of the law than needed to protect civil rights in Runyon v. McCrary.

Bork was critical of the supreme Court's decision in Reitman v. Mulkey 387 U. S. 369 (1967) where the Court upheld the State of California's open housing law against a popularly passed State Proposition 14 which would have overturned the law.

In 1968, Congress passed the Fair Housing Law in April. In December of that same year, Mr. Bork argued that Reitman could not be "fairly drawn" from the 14th Amendment in the U. S. Constitution although the Supreme Court had upheld California's open housing law with provisions similar to the Fair Housing Act. (see "The Supreme Court Needs a New Philosophy," Fortune, December, 1968.)

As Solicitor General, Mr. Bork opposed fair housing remedies for low income blacks even when federal programs caused the racial segregation in federally-financed housing. He reportedly unsuccessfully opposed the remedies civil rights litigants were arguing for in Hills v. Gatreaux, 425 U. S. 284 (1976).

Mr. Chairman, the NAACP is more concerned about the specific

instances where Mr. Bork used his legal skills to oppose civil rights claims aimed at ending housing discrimination than general confirmation statements that he opposes racial discrimination or dubious claims that he has advanced civil rights.

Just the other day, I was talking with an eminent civil rights law professor and the conversation turned to the Bork confirmation. The professor said to me, "the thing that troubles me, is that Judge Bork never can seem to find a remedy for discrimination."

Affirmative Action - Bakke

Judge Bork has also criticized the decision in University of California Regents v. Bakke, 438 U. S. 265 (1978) wherein the Supreme Court upheld affirmative action against an attack that the school's plan using race, ethnic origin, etc. as a factor for admission was unconstitutional. Bork explicitedly criticized Justice Powell's distinction that universities cannot use raw racial quotas; however, they could use race, among other factors. In disagreeing with the decision, Bork contended that universities should not be allowed even to use race, among other factors, to get a diverse student body:

> Justice Powell's middle position -- universities may not use raw racial quotas but may consider race, among other factors in the interest of diversity among the student body -- has been praised as a statesmanlike solution to an agonizing problem. It may be. Unfortunately, in constitutional terms, his argument is not ultimately persuasive.
>
> [Justice] Powell's vision of the Constitution -- that the 14th Amendment allows some 'reverse discrimination' -- remains unexplained. Justified neither by the theory that the amendment is pro-black nor that it is colorblind, it must be seen as an uneasy compromise resting upon no constitutional footing of its own.

In 1978, Bork saw no constitutional basis, not even under the 14th Amendment, allowing institutions to use race as one of many factors. Mr. Chairman, the NAACP is not asking the Senate for a referendum on affirmative action. Rather, we are asking that you consider Judge Bork's criticism of the Bakke case as resting on no constitutional footing. We submit that is the very controversial legal question which the Supreme Court has been faced with and has repeatedly ruled on within the past two years. We further contend that, notwithstanding Judge Bork's position, that there is ample constitutional footing to hold the use of race as constitutionally permissable as regards affirmative action plans.

In 1987, during the confirmation hearings, Judge Bork in commenting on the Bakke case said:

> Yes, I think generally I have certainly objected to race. Now, when you get into use of race as a criterion for remedial purposes, that is a different kind of animal. I do not think I took a constitutional position...
>
> And I think I have made it plain enough -- well, I wrote what I thought about the policy, so there is no point in me saying I do not have a policy view. But I think I have made it plain that my policy views do not determine my statutory or constitutional veiws.

But, Senators, that is the point. Judge Bork did express his constitutional views on the use of race. Re-read the quote excerpted from his article written in 1978:

> It may be. Unfortunately, in constitutional terms, his argument is not ultimately persuasive. Justified neither by the theory that the amendment is pro-black nor that it is colorblind, it must be seen as an uneasy compromise resting upon no constitutional footiog of its own.

Bork's Civil Rights Record as Solicitor General

The NAACP does not ignore Mr. Bork's record as Solicitor General of the United States. In that capacity he was responsible for legal representation of the Executive Branch of government in litigation. Supporters of Nominee Bork point to his work as Solicitor General as illustrative of what he has done to advance civil rights. The bottom line, they contend, is to judge the nominee by his work, and not by his writings. This we have done.

The Boston Case - Morgan v. Kerrigan

The Boston school desegregation case involved a court-ordered plan calling for magnet schools; the transporting of students; setting up parent councils in desegregated schools and other remedial actions. The NAACP litigated this case. The General Counsel of the NAACP at that time - Nathaniel C. Jones, detailed the obstacles the NAACP faced with Mr. Bork as Solicitor General (see attached copy of article, "The Desegregation of Urban Schools Thirty Years After Brown, written in 1984 by Judge Jones, 55 Colorado Law Review 4 (1984), 525 before Judge Bork's nomination as an Associate Justice. Judge Jones notes re the Boston School case at pp. 537-541:

> At one point, the conference room of the Attorney General of the United States, Edward Levi, was the setting for the drama.

Jones details the scene in a footnote on page 538:

> On May 14, 1976, Roy Wilkins, Executive Director of the NAACP, in a telegram to attorney General Edward Levi, expressed his dismay at reports that the Solicitor General of the United States [Robert H. Bork] was prepared to intervene in the Supreme Court on the side of the Boston School Committee. Wilkins asserted that:

> Seeking Supreme Court review of a case with a record so marked with defiance, recalcitrance and violence by school officials and street mobs, particularly ensures continued undermining of the judicial process. I urge that if the Department [Department of Justice] does intervene, it does so in support of the rulings of courts below, where the issues have been thoroughly litigated.

Following the message, the then U. S. Senator from Massachusetts Edward Brooke and William Coleman, Jr., Secretary of Transportation, urged the Attorney General to receive a delegation of civil rights leaders headed by Wilkins and Clarence Mitchell. Brooke told Steve Wermil of the Boston Globe that when he informed President Ford about the contemplated Justice Department action, 'I could tell he did not know about the government position.' The President said to Brooke, 'Ed, certainly this has not been done with my consent or direction.' The meeting was held, at which time Clarence Mitchell, Jr., Director of the NAACP Washington Bureau, and I, made presentations. Mitchell was quite strong in reminding the Attorney General of his past efforts with former Attorneys General Herbert Brownell and others, to bring about laws permitting the Justice Department to intervene in cases on behalf of victims of discrimination. He pointedly noted that the steps contemplated by the Justice Department were at total variance with that duty. id. p. 536.

I was National Director of Education at that time and I recalled our then General Counsel telling us that Solicitor General Bork was unyielding in his position to intervene on the side of the School Committee. The Solicitor General was clearly advocating against the rights, the civil rights of the litigants in the Boston case. One week after NAACP officials met with the Attorney General re stopping the Solicitor General from undoing the school desegregation order, the NAACP met with President Ford seeking his assistance. After this meeting, no attempt was made to undo the school desegregation order.

Mr. Chairman, and members of the committee, this is one firsthand example that the NAACP has to negate the claim made now by Judge Bork that as Solicitor General he did not advocate a position against the interests of minority plaintiffs. In the Boston case, the Supreme court had denied certiari Clearly, to the NAACP, Solicitor General Bork attempted to use his legal skills against civil rights litigants when action by the Solicitor General was unnecessary.

We invite the Committee to review the testimony of William Coleman during these confirmation hearings where he details that the Nominee used his legal skills as an obstacle to civil rights litigants in the Runyon v. McCrary case.

In the case of Pasadena v. Spangler, another NAACP case, Solicitor General Bork argued an even narrower position before the U. S. Supreme Court than what was agreed to and written in his brief. This is another

instance where the nominee, as Solicitor General, did not advance the cause of civil rights.

The NAACP also questions claims made by Nominee Bork that, as Solicitor General, he advocated in the interests of female plaintiffs. Information received from then Department of Justice official, Brian Landsberg, clearly reveals that Mr. Bork tried to advance a narrower interpretation of the law than what the civil rights plaintiffs argued and what was actually adopted by the Supreme Court. Here again, Solicitor General Bork used his legal skills as an obstacle to civil rights litigants.

In sum, we question whether credit should be given to nominee Bork for advancing civil rights while he was Solicitor General. His duty as Solicitor General required some degree of competent legal skills to advocate in court the interests of his clients - the executive branch and the agencies. It should be noted that even in stormy controversial times, Solicitor General Bork used his skills against civil rights litigants.

Record as an Appellate Court Judge

The NAACP has not ignored the nominee's record as an appellate court judge. We take judicial note of the statistical report that show that in those cases where the outcome of the decision was not unanimously agreed upon by the sitting judges, Judge Bork sided against the minority, civil rights or female litigants most of the time. For example, in split decisions in constitutional law wherein the executive branch was a party, Judge Bork never sided with the individual's claims, rather he sided 6 out of 6 times with the executive branch (see Public Citizen Litigation Group, "The Judicial Record of Judge Robert H. Bork", 1987.)
Other reports show different statistics, however, all of them similarly show that Judge Bork sides against civil rights litigants unless the judges are unanimous in the outcome of the case.

When one studies the Bork record on the Appellate Court, you find that he sided 6 out of 6 times with the executive branch when there were split decisions in constitutional law wherein the executive branch was a party. He also does not recognize that sexual harassment on the job includes a male creating a hostile or offensive working environment (Vinson v. Meritor Savings Bank).

The NAACP has found no evidence that shows that Judge Bork has gained any experience on the appellate bench in deciding constitutional challenges of denied civil rights in the areas of voting, housing discrimination, employ-

rent discrimination, etc., and remedies to discrimination as affirmative action. These kinds of constitutional challenges have not been before him. Nevertheless, Judge Bork has continued to criticize landmark Supreme Court cases in the above-mentioned areas in his speeches and public interviews since he has been on the court. We note that the nominee has faced cases involving statutory interpretations, e. g. the Sumter County voting rights case. Mr. Chairman, I should point out that the constitutionality of the civil rights statutes have already been decided by the Supreme Court. This has not deterred nominee Bork from criticizing the very constitutional basis for Congress' enactment of the statute.

The National Association for the Advancement of Colored People opposes the confirmation of Judge Robert H. Bork to be an Associate Justice of the U. S. Supreme Court. We submit that his views--his ideology-- are not in the mainstream of society.

The Senate can and should consider ideology. The Taylor report submitted herewith as part of our testimony, documents how ideology has been a decisive factor in the shaping of this country from its inception. It has historically been considered by the Senate in its "advice and consent" function. No less weight should be given to ideology today in 1987 than was given in 1795 when George Washington sought to place John Rutledge of South Carolina on the Court.

Judge Bork's philosophy allows for a narrow view of the original intent of the Framers under the 14th Amendment to the Constitution. We listened to Judge Bork's testimony, read his writings and other public statements. It is clear to the NAACP that the Judge's philosophy of original intent is detrimental to established constitutional doctrines protecting individual rights. Moreover, we see this philosophy severely restricting the ability of a judge to meet the modern needs of this great nation.

We find Judge Bork's philosophy regarding judicial restraint discomfiting, to say the least. He admonishes judges for making the law, acting improperly or injecting their own morals into decisions. We see evidence of his engaging in the very actions he decries.

The NAACP recalls all too vividly, Mr. Chairman, how the term "judicial restraint" was bandied about in the 1950's and '60's by people attacking racial desegregation ordered by judges. They claimed that judges were acting unconstitutionally, acting like lawmakers. etc. Today, this same legal rhetoric is being used to attack certain constitutional doctrines - the right to

privacy -- substantive due process --expansion of landmark cases on equal protection to outlaw racially restrictive covenants --the principle of one man, one vote, and other doctrines used to advance civil rights or individual liberties.

We reject Judge Bork's criticism of these constitutional doctrines. They do not clearly outline what action is constitutionally protected and what is not. There is no general code of conduct to brightly and clearly say an individual can do specifically "this" and not specifically "that." Judges must interpret our laws. If nominee Bork is serious about his criticism then one must seriously doubt whether he would be able to address vague areas of the law and therefore the nation would be best served if he is now elevated from his appellate court seat where he will be provided guidelines by the U. S. Supreme Court.

We are uneasy about nominee Bork's lack of respect for judicial precedent. A poignant example from one of his 1985 speeches is illustrative:

> I don't think that in the field of constitutional law, precedent is all that important...And if you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it.

Over the years, nominee Bork has contended that the Court has misread the Constitution in right to privacy cases, substantive due process cases, certain freedom of speech cases protecting conduct he disapproves of, several landmark equal protection cases where the court outlawed sterilization, the poll tax, racially restrictive covenants or where the court upheld the use of race in affirmative action plans, and the list goes on.

The NAACP finds that nominee Bork holds protection of individual liberties on a lower level of court attention than protection of other interests. We flatly disagree with Judge Bork's view that to give liberties to some individuals is to take liberties away from others. Instead, the NAACP maintains that when liberties and rights are given to some Americans, they are given to all Americans. Yet, in 1987, during his confirmation hearings, Judge Bork clearly said "I think that is not correct."

Mr. Chairman and members of the Committee, time after time, in the development of civil rights for black Americans, we have seen how these and other civil rights were expanded for all Americans:

- In expanding voting rights to black Americans, the Congress and the Courts went on to expand them for Hispanics and other groups;

- In outlawing the poll tax which discriminated mainly against black and low income Americans, the court went on to outlaw the poll tax for all Americans;

- In expanding housing opportunities for black Americans, opportunities were expanded for families with children and for people with handicapping conditions;

- In expanding the equal protection of the laws to black Americans, this constitutional protection was expanded for other ethnic groups, for women, for illegitimate children, for people entering this country who are not citizens, and numerous others.

The list could go on, but it is clear to the NAACP, that in expanding the rights for some people is enlarging them for all people.

There is yet another practical problem with Judge Bork's views on individual liberties which would upset individual rights if he sat on the Supreme Court. Madison spoke of the awesome and sole function of the Court as the protector of individual rights when the Framers were considering the Bill of Rights. This unique function has also been acknowledged in court opinions. Yet, with pointed clarity, Judge Bork said he would erase all references to this unique function in these words:

> I am thinking of putting errata sheets in every copy of the United States Reports stating that footnote was a typographical error, thus wiping out the entire jurisprudential industry... (1974 speech at the Mayflower Hotel)

Judge Bork was referring the famous Footnote 4 in the Carolene Products case.

Judge Bork's writings about constitutional or judicial philosophy are not the only issues of concern to this organization. We have grave reservations about his firing of Archibald Cox. This was an illegal action according to the court and yet, during his confirmation hearings, Judge Bork contended that his actions were lawful. The Senate must question his alleged behind-the scenes changing of judicial action by another judge--Judge Gordon, now deceased, places a responsibility on Judge Bork to satisfactorily explain his actions to the Senate panel. He has failed to do so. His reported actions to change decisive judicial action determining the outcome of specific cases before the appellate court on which he now sits is even viewed by his colleagues as conduct which will erode public confidence in the judiciary. His 1987 "confirmation conversions" re long-held and frequently-voiced judicial philosophy has served to erode his credibility, whereas pre-confirmation hearings he was merely perceived as an "opinionated" person.

The NAACP urges the Judiciary Committee and the full Senate to reaffirm our faith in the Constitution - the living Constitution, to ensure that the

person confirmed as an Associate Justice on the Supreme Court is committed to protect the rights of the people.

We have been reminded during these confirmation hearings that we are this year celebrating the Bicentennial of the Constitution. The nominee has relied heavily on the intent of the Framers. The NAACP urges this committee and the Senate to remember that Chief Justice Taney, in the Dred Scott decision wrote that the Constitution was not meant for blacks, be they free or slave, and that the black man had no rights that the white man was bound to respect. This decision was so out of touch with the mainstream of political thought, even during a period of slavery, that it hastened the War between the States, and it has stood as a monumental blot on the Court's history.

Judge Bork's wit, his charisma and his charm, brilliance has been touted by those who support his nomination for the Supreme Court. The NAACP does not question those attributes. The NAACP contends strongly that the nation needs a person on the High Court who believes in a living Constitution that is inclusive in nature. We do not believe that person is Judge Bork.

Thank you for this opportunity to be heard.

APPENDICES

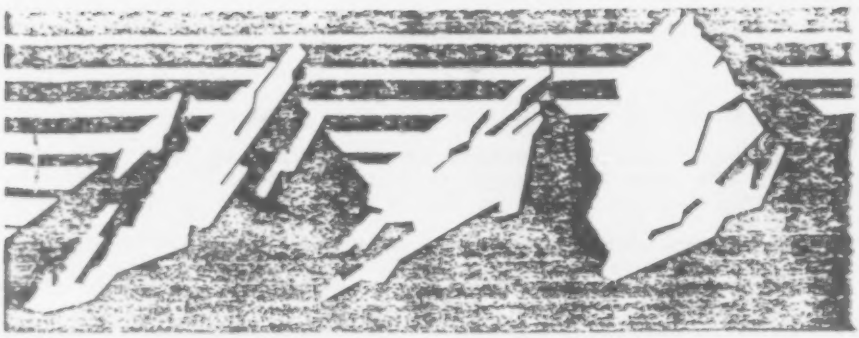
Nathaniel R. Jones, "The Desegregation of Urban Schools Thirty Years After Brown," 55 Colorado Law Review 4, Summer, 1984, 525, 537-541.

Olive Taylor, Two Hundred Years, An Issue: Ideology in the Nomination and Confirmation Process of Justices to the Supreme Court of the United States. (Washington, D. C.: Washington Bureau, NAACP, September, 1987)

J. Clay Smith, Jr., "A Response to Professor Robert E. Bork's 'Giving Meaning to the Constitution: Competing Visions of Judicial Review'" (Unpublished Paper presented at the Twelfth Annual Meeting of the District of Columbia Court of Appeals Judicial Conference on June 12, 1987.

J. Clay Smith, Jr., "Toward Pure Legal Existence: Blacks and the Constitution". (unpublisned paper presented at the Distinguished Lecture Series of the Schomburg Center for Research in Black Culture, the New York Public Library, commemorating the Bicentennial of the United States Constitution, June 18, 1987

Letter to Senators Joseph Biden and Strom Thurmond from the faculty of the Howard Unviersity School of Law (September 17, 1987)



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THE DESEGREGATION OF URBAN SCHOOLS THIRTY YEARS AFTER *BROWN*

HONORABLE NATHANIEL R. JONES

During the great controversy that erupted over the attempt by the Reagan Administration to reverse the IRS policy barring tax exemptions for segregated private schools, President Reagan, in talking with a group of black school children in Chicago, offered this explanation: "I was under the impression that the problem of segregated schools had been settled, and maybe I was wrong. I didn't know there were any court cases pending."[1]

While the record shows that the President was woefully uninformed on the facts with regard to cases pending, the rest of his statement reflects a misconception shared by many of his fellow Americans. They labor under the illusion that the problem of segregated schools in American has been settled. This fallacy fuels the resistance that has hindered the efforts at desegregation over much of the thirty years since *Brown* was decided in 1954, particularly that in the North. Justice Thurgood Marshall acknowledged this reality in his dissenting opinion in *Milliken v. Bradley* in 1974: "Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution. . ."[2]

The Reagan "explanation" and the observation of Justice Marshall, I think, point up the nature of the difficulty confronting the courts, litigators, educational administrators and policy makers as they face the problems of remedy in the 1980's and beyond. Until the public mind is disabused of the notion that the "problem" of segregated schools has been eliminated, America will continue to be two societies: black and white, separated and unequal. One of the reasons for the resistance to various remedial measures is the difficulty the public has in understanding the nexus between the present segregation condition and that which existed in the past. Given the misperceptions as to the nature and origins of present day racial segregation, it is important on the 30th anniversary of *Brown v. Board*

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1. Miller, *Ronald Reagan and Techniques of Deception*, ATL. MONTHLY 62, 64 (Feb. 1984).

2. Milliken v. Bradley 418 U.S. 717, 814 (1974).

of Education[3] to examine its historical development. (The segregation visited upon Hispanics and other ethnic groups springs from a type of mentality similar to that which led to the subjugation of black Americans.) Separate schools represent but one dimension of the problem with racial treatment. The system of segregation affected the lives of blacks across the board. A caste system that barred or limited black participation in the whole process of government flourished. This system was enforced by courts and backed up by custom. The decision to attack the school segregation aspect of the system in the 1930's was seen as the most direct method ofchallenging the judicial sanctification of the whole system of racial caste.[4] Thus, central to the school desegregation issue today is the same problem that was present at the time of slavery, reconstruction, and *Plessy v. Ferguson*.[5]

I believe that school desegregation remedies will be more readily accepted as increased numbers of Americans come to understand that segregation in America today is but a current manifestation of the badges of slavery. I therefore approach the presentation of my views on the 30th Anniversary of *Brown* from a historical context. These historical events were interdicted or brushed aside as irrelevant by the vociferousness of the anti-desegregation rhetoric. Hopefully, we can begin to restore some perspective to the issue.

I. Deep Are The Roots

There is today a casualness, almost a cynicism, associated with a reference to slavery. This reaction feeds a national amnesia about the insidiousness of that institution and the vestiges of it which are evident in a variety of contemporary institutions. Consequently, the public has difficulty accepting, in this period of time, remedies for racial wrongs. There is a sense of attenuation so strong that it submerges any notion of current responsibility to correct those sins. We are mindful that with *Plessy* the containment and control of victims of discrimination was tranferred from individuals to institutions. The individual choices and options were thereby shifted to the institutions that direct our lives. Thus, individuals were freed of the decisions that would generate personal guilt or feelings of responsibility for perpetuating the harm of racial segregation.

I begin this paper by acknowledging a debt to Judge Leon Hig-

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3. 347 U.S. 483 (1954).
4. Plessy v. Ferguson, 163 U.S. 537 (1896).
5. *Id.*

ginbotham of the United States Court of Appeals for the Third Circuit, who authored *In The Matter of Color*.[6] In that book, Judge Higginbotham quotes texts of newspaper advertisements for the sale of slaves. To help us understand the nonperson status of our forebearers, I cite just two of the ads:

> One Hundred and twenty negroes for sale - the subscriber has just arrived from Petersburg, Virginia with One Hundred and twenty likely young negroes of both sexes in every description, which he offers for sale on the most reasonable terms. The lot now on hand consists of ploughboys, several likely and well qualified house servants of both sexes, several women and children, small girls suitable for nurses, and *several small boys without their mothers*. Planters and traders are earnestly requested to give the subscriber a call previously to making purchases elsewhere, as he is enabled to sell as cheap or cheaper than can be sold by any other person in the trade.
>
> Hamburg, South Caroline, Benjamin Davis.[7]

> Negroes for sale - A negro woman, 24 years of age, and her two children, one eight and the other three years old, said negroes will be sold separately or together, as desired. The woman is a good seamstress. She will be sold low for cash, or exchanged for groceries. For terms, apply to Matthew Bliss and Company, One Front Levee.[8]

In addition to the foregoing, Judge Higginbotham's book refers to statutes enacted by States that offered rewards to bounty hunters bringing in the scalps and ears of runaway slaves. The reason for referring to these advertisements and statutes is to emphasize the practices regularly enforced as part of the American commercial and legal system.

Ultimately, the Civil War was fought over the issue of slavery, the Emancipation Proclamation was issued by President Lincoln, civil rights statutes were enacted during the Reconstruction era, and the Thirteenth, Fourteenth, and Fifteenth Amendments became a part of the Constitution. All of this was done in an effort to benefit the newly-freed slaves[9] and their descendants and to provide a rem-

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6. HIGGINBOTHAM, IN THE MATTER OF COLOR (1976).
7. *Id.* at 12.
8. *Id.*
9. LOGAN, THE BETRAYAL OF THE NEGRO, Ch. 2.

edy for the effects of slavery. This, however, was aborted.

There were many currents that combined to sweep away these tools of remedy and the Reconstruction gains. One of the most telling was the resolution of the Hayes-Tilden deadlock over the Presidency of the United States in 1877. It signaled that the federally-proclaimed rights of Blacks would have to yield to State's Rights.[10] As night followed day, the Southerners called off the filibuster which was delaying a resolution of the election of the President. Hayes was elected President of the United States, the troops were withdrawn, and the South began the process of taking back that which had been given to the former slaves in the form of recognition of their humanity and their citizenship. Black codes and vagrancy laws,[11] even though they violated the Fourteenth Amendment, were used to control the lives and movement of former slaves.

These measures reached their plateau from a constitutional standpoint when the Supreme Court ruled in 1896 in the case of *Plessy v. Ferguson* that irrespective of what the Fourteenth Amendment's equal protection clause provided, States were free to segregate persons on the basis of color so long as the facilities to which they were relegated were "equal" to those afforded whites. In the wake of that pronouncement by the Supreme Court, all institutions in America, North as well as South, rushed headlong into the adoption of policies and practices which put into place the principle of separate-but-equal. The public schools did not escape. Rather, many state constitutions and statutes riveted the requirement of racial separation into public school systems.

II. The Early Days of Litigation

In July, 1935, the brillant Charles Hamilton Houston of the Howard University Law School joined the staff of the NAACP as Special Counsel. His task was to facilitate the legal defense work of the Association. Though the legal department was established in 1911, it had been manned by various volunteer lawyers. Houston's principle assignment was to design and carry out a legal campaign against discrimination in education and transportation. As pointed out by his biographer, Genna Rae McNeil, the "more acute" issue of discrimination in education received the greater portion of his time. Mindful of other forms of discrimination, Houston felt that "[s]ince education is a preparation for the competition of life," a poor educa-

10. *Id.*

11. Bennett, Before the Mayflower 192 (1966).

tion handicaps black youth who with "all elements of American people are in economic competition."[13] Houston was convinced that failure to eradicate inequality in education of Black youth would condemn the entire race to an inferior position within American society in perpetuity.[14]

Also driving Houston as he developed the NAACP's thrust against unequal segregated public education was a conviction that

> "equality of education is not enough. There can be no true equality under a segregated system. No segregation operates fairly on a minority group unless it is a dominant minority. . . . The American Negro is not a dominant minority: therefore he must fight for complete elimination of segregation as his ultimate goal."[15]

Houston accepted the NAACP offer on the condition that there be undertaken a program of litigation on a protracted basis, to prosecute test cases to win favorable legal precedents as a foundation for mounting frontal attacks against the separate-but-equal doctrine. He was firmly convinced that the step-by-step approach would bear greater fruit. In justifying the need for blacks to litigate for their rights, he observed:

> "We must never forget that the public officers, elective or appointive, are servants of the class which places them in office and maintains them there. It is too much to expect the Court to go against the established and crystalized social customs, when to do so would mean professional and political suicide. . . We cannot depend upon judges to fight . . . our battles."[16]

Of the three "glaring and typical discriminations" targeted by Houston, the one that he focused on was the inequality in graduate and professional education. The decisions in those cases provided the most immediate and direct precedents that led to the *Brown* holding in 1954.[16]

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12. MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

13. *Id.*

14. *Id.*

15. *Id.*

16. McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950); Sweatt v. Painter 339 U.S. 629 (1950); Sipuel v. Board of Regents 332 U.S. 631 (1948); Missouri ex rel Gaines v. Canada 305 U.S. 337 (1938); and Pearson v. Murray, 169 Md. 478, 182 A. 590 (1936);

The first test of the *Plessy v. Ferguson* separate-but-equal notion in higher education was offered by the NAACP under Houston in 1935. The case was filed on behalf of Donald Gaines Murray of Maryland, whose case was brought to Houston's attention by Thurgood Marshall, who had been Houston's star student at Howard and was then a practicing attorney in Baltimore. Murray, an Amherst graduate, sought to enroll in the University of Maryland Law School. The case of *Pearson v.Murray*[17] was heard in 1935. In a signal victory, the Maryland Court of Appeals ordered the university to enroll Murray.

Consistent with Houston's strategy, other cases were selected to drive a bigger wedge into the separate-but-equal barrier. He next settled on the case of Lloyd L. Gaines who sought admission to the University of Missouri Law School. Upon being turned down by the Missouri Supreme Court, Houston, now aided by his new assistant, Thurgood Marshall, appealed the case to the United States Supreme Court. On December 12, 1938, the Supreme Court reversed the Missouri court in a historic opinion authored by Chief Justice Charles Evans Hughes.[18]

It would be another decade before the Supreme Court would pass on other cases designed to lay further bricks in the foundation necessary for overturning *Plessy v. Ferguson.* In 1948 the University of Oklahoma was ordered to admit Professor G. W. McLaurin to its graduate school,[19] and the state's law school was directed to admit

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17. 169 Md. 478, 182 A. 590 (1936).

18. Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938). Chief Justice Charles Evans Hughes wrote:

> The question here is not of a duty of the State to supply legal training or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. . . . That is a denial of the equality of legal right to the enjoyment of the privilege which the state has set up and the provision for the payment of tuition fees in another State does not remove the discrimination.
>
> The equal protection of the laws is a pledge of the protection of equal laws.
>
> The essence of the contitutional right is that it is an individual one. . . . It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the state afforded for persons of the white race, whether or not other negroes sought the same opportunity.

305 U.S. at 349-51.

19. McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).

Ada Lois Sipuel.[20]

By this time the whole separate-but-equal doctrine was under serious question and there was developing a considerable degree of judicial discomfort. Most doubts as to how troubled the Supreme Court was with separate-but-equal were dispelled in the case of *Sweatt v. Painter*.[21] There it was held that Texas' attempt to meet the test by providing the Texas Law School for Negroes was woefully inadequate and that Herman Sweatt had to be admitted to the law school of the University of Texas. Of particular significance were the words chosen by the Supreme Court:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, tradition and prestige.[22]

The Court was tiptoeing ever closer to the point of overruling *Plessy*, even though it specifically declined to do so in *Painter*.[23]

Finally, on May 17, 1954, the Supreme Court squarely confronted the separate-but-equal doctrine in *Brown v. Board of Education*.[24] The issue was first formulated by Charles Houston in 1935 when he developed his strategy to attack racial segregation in public education.[25] The Court declared that the doctrine did indeed offend the equal protection clause of the Fourteenth Amendment. The stage was thereby set not only for a full scale attack on racial segregation in public education but on segregation in all aspects of American life.

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20. Sipuel v. Board of Regents, 332 U.S. 631 (1948).
21. 339 U.S. 629 (1950).
22. *Id.* at 634.
23. *Id.*
24. 347 U.S. 483 (1954).
25. G. McNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

Houston's biographer, McNeil, points out in *Groundwork*, that he differed from his predecessor, Nathan Margold, who had proposed an immediate and direct attack on segregation. Houston "believed the step-by-step process would have greater long-range effects, first because it would take into account the lack of tradition for equality within the American legal system." He initially selected differentials in teacher salaries between white and Negro teachers; inequalities in the transportation of pupils, wherein white pupils were bused and Black children were forced to walk, and inequality in graduate and professional education in state institutions.

The cases before the Supreme Court in 1954 arose in Kansas[26] (Topeka), South Carolina[27] (Clarendon County), Virginia[28] (Prince Edward County), and Delaware[29] (Wilmington). They constitute *Brown I*. Re-argument was ordered for the purpose of consideration of appropriate relief and the formulation of remedial decrees. The decision on these latter issues in 1955 became known as *Brown II*.[30]

I never cease to be amazed at how few people - lawyers, educators and editors - have read *Brown*. Its holding cannot be repeated too often. The Court unanimously declared in *Brown I* that

> "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.
>
> . . . .
>
> We conclude that in the field of public education the doctrine of "separate-but-equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are . . . [b]y reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth

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26. 347 U.S. 483, 486 Brown v. Board of Education, 98 F. Supp. 792 (D. Kan. 1951). This case was an attack before a three-judge Federal Court on June 25, 1951, on a Kansas statute allowing Class One Board of Education to maintain segregated schools. The court upheld the constitutionality of the segregation, though acknowledging that "segregation of white and colored children" had a "detrimental effect upon colored children."

27. 347 U.S. 483, 486. This case was litigated as Briggs v. Elliott and dealt with the schools of Clarendon County, South Carolina. Though the district court refused to grant the injunction against enforcement of state statutes and the Constitution, it nevertheless found the black schools to be inferior. Briggs v. Elliott, 103 F. Supp. 920 (E.P.S.C. 1952).

28. Griffin v. County School Bd. of Prince Edward County, Virginia, 337 U.S. 218 (1964). This case involved the high school facilities in Prince Edward County, Virginia. It opened on February 25, 1952 before a special three-judge Federal Court in Richmond, with NAACP attorneys Spottswood W. Robinson III (now Judge on the U.S. Court of Appeals for D.C.); Robert L. Carter (now U.S. District Judge, Southern District of N.Y.); and Oliver W. Hill of Richmond. This case was called the most comprehensive education suit brought by the NAACP. The Court decided the case on March 7, 1952, upholding constitutionality of the school system but ordering an equalization of the black and white schools.

29. 347 U.S. 483, 487, 488. The Delaware case involved two consolidated cases: Claymont High School of North Arlington, and the Hockessin School No. 29 of South Arlington. This case was filed in 1951, and tried in October of 1951 by Chancellor C.J. Seitz, who is a member of the U.S. Court of Appeals for the Third Circuit. He held for the black plaintiffs. Gebhart v. Belton, 33 Del. Ch. 144, 91 A.2d 137 (1952).

30. Brown v. Bd. of Education II, 349 U.S. 294 (1955).

Amendment.[31]

In *Brown II*, the Supreme Court addressed the question of implementation. In doing so, the Court declined to set a uniform deadline for the elimination of segregation, choosing instead an "all deliberate speed" rule, given the variety of circumstances that would confront the district courts and communities. Contrary to the assertions of many today, the Court was sensitive to the need for people to adjust to change. *Brown II* certainly reflected this sensitivity. This proved to be the beginning of the difficulties that hounded the entire implementation process from that day until, in exasperation in 1969, the Supreme Court was compelled to convert to an "immediacy" rule. In *Alexander v. Holmes County Board of Education*[32] the Court announced a rule that put an end to delays and "all deliberate speed."

It is instructive, as we review events over these past thirty years, to note significant turning points. Two years after *Brown II*, in the face of the massive resistance campaigns that leap-frogged across the South, the Supreme Court was forced to confront the issues of timing and remedies. The conduct of the Governor of Arkansas, Orval Faubus, and other state officials who defied a federal court order to admit nine black children to Central High School in Little Rock, precipitated a constitutional crisis that led the Supreme Court to convene a rare special session. Subsequently, the President of the United States was forced to send in federal troops and to federalize the Arkansas National Guard. The case of *Cooper v. Aaron*[33] found the Supreme Court reaffirming the *Marbury v. Madison*[34] supremacy principles of the Constitution. The Court held that *Brown*

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31. *Id.* at 493, 495.

32. Alexander v. Holmes County Board of Educ., 396 U.S. 19 (1969). The Court declared in a per curiam opinion:

> [T]he case is remanded . . . to issue . . . decree and order, effective immediately, declaring that each of the school districts here involved may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate as unitary school systems.

396 U.S. at 20.

33. 358 U.S. 1 (1958). The Supreme Court noted that Article VI of the Constitution makes the Constitution the "Supreme Law of the Land."

> [T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the County as a permanent and indispensible feature of our constitutional system.

358 U.S. at 18.

34. Maybury v. Madison, 1 Cranch 137, 177 (1803). Those principles include the proposition that the Constitution is the "fundamental and paramount law of the nation" and that "it is emphatically the province and duty of the judicial department to say what the law is."

was the supreme law of the land and that Article IV made it binding upon all states regardless of state laws to the contrary. This reaffirmation profoundly shaped future events. While there were many confrontations, the opponents of *Brown* were eventually forced to resort to strategies other than violent resistance, nullification, and interposition. Among the most ingenuious tactics were the so-called voluntary transfer plans and freedom of choice options. These, it was thought, would bring the states and resentful school officials into a degree of technical compliance with court decrees sufficient to relieve judicial pressure.

On the contrary, these measures precipitated a new round of responses by plaintiffs who did not accept the contention that *Brown* countenanced anything short of meaningful desegregation. In *Monroe v. Jackson*[35] and *Raney v. Gould*[36], the Supreme Court struck down voluntary transfer and freedom of choice plans. Finally, in *Green v. New Kent County*[37] the United States Supreme Court laid down a standard for measuring a remedy that was clear and unambiguous. Under this test, once it had been shown that a dual system was in existence by force of state action, public officials had the "affirmative obligation" to take all necessary steps to dismantle that dual system, "root and branch." The Court did not flatly reject voluntary elements of plans. It simply declared that the test of any remedy was its effectiveness, and if the plans left the school or system segregated, they could not be approved.

As *Cooper v. Aaron* proved to be a turning point in school desegregation, the approach adopted by the newly-elected Nixon administration proved to be another. In 1969, the Justice Department, which before the time of *Brown* had supported desegregation and the enforcement of court orders, aligned itself with the State of Mississippi and the 33 school districts in their effort to win a stay of desegregation orders. The United States Supreme Court took this occasion to overturn its "all deliberate speed" time table and instituted the "immediacy" notion for remedy in *Alexander v. Holmes.*[38] The court was clearly fed up with years of delays. Another significant holding that year was that handed down in the case of *U.S. v. Montgomery*,[39] where the Court agreed that a desegregated system re-

35. 391 U.S. 450 (1968).
36. 391 U.S. 443 (1968).
37. 391 U.S. 430 (1968).
38. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).
39. U.S. v. Montgomery County, 395 U.S. 225 (1969).

uired desegregated facilities and administrative staffs.

Even after the change of national administrations had taken lace, school desegregation in the South continued at a slower pace. he Nixon administration, consistent with its Southern strategy, ade a number of attacks on the important school desegregation medy of transportation or "busing." President Nixon demagogued is issue unmercifully. On March 16, 1972, in a national television ddress, he announced the introduction of legislation to "call an im- ediate halt to all new busing orders by federal courts." He tied the ands of the Office of Civil Rights of HEW (OCR), forcing the res- nation of Leon Panetta, who had, as Director, protested adminis- ation policies. Nixon's successor, Gerald Ford, was no better; both elped to convert "forced busing" into code words for racism. The ord Justice Department, headed by Attorney General Edward Levi nd Solicitor General Robert Bork announced in May, 1976 that it as prepared to intervene in the Supreme Court in the Boston school se in support of the defendant School Committee. Civil rights roups requested conferences with Levi and later the President. As a sult of these conferences, the Ford Administration backed off. At e White House Conference, Clarence Mitchell, Jr., chief lobbyist r the NAACP and the Leadership Conference on Civil Rights, harply rebuked the President for his use of the term "forced bus- g." After the rebuke, the President blushed, apologized and prom- ed to speak with greater precision. Nevertheless, he promptly went Michigan where he gave a series of speeches on "forced busing" ny number of times.

The President had earlier compounded the problem in Boston criticizing Judge W. Arthur Garrity Jr.'s decision. He said, "The ourt decision in that case in my judgment was not the best solution quality education in Boston. I respectfully disagree with the dge's order." That the President, a lawyer himself, was either igno- nt of or indifferent to the command of *Brown* but nevertheless oke out as he did, explains to some extent how the issue of busing remedy unconstitutional segregation remained inflamed and dis- rted the objectives of school desegregation.

Countering the earlier shift in the Nixon Justice Department sition was *Swann v. Charlotte-Mecklenburg Board of Educa- on*,[40] an important pronouncement from the Supreme Court on the sue of neighborhood schools, quotas, and the use of transporta-

40. 402 U.S. 1 (1971).

tionfor busing. The litigation efforts challenging dual systems had by the 1970's reached urban or metropolitan school systems of significant size. Those in charge of the systems were slow to act and in most cases did not act without private plaintiffs initiating litigation. As Jill Hart declared in the *Urban Review* "[t]he basic framework of urban desegregation law was established by the Supreme Court with the 1971 decision of *Swann v. Charlotte-Mecklenburg Board of Education*."[41] In *Swann*, the Court considered and approved the use of race-sensitive remedies, questioned the sanctity of neighborhood schools, and called transportation for busing an integral tool of public education. This highly significant opinion, authored by Chief Justice Warren Burger, declared:

> Absent a constitutional violation, there would be no basis for judicially ordering assignments of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system.[42]

It is clear that the Court had matured immeasurably since *Brown II*, when it decreed, some think naively, that desegregation should proceed with "all deliberate speed." Significantly, in the face of continuous, serious and in some cases, simple minded challenges, the Supreme Court refused to retreat from its basic holding in *Brown I*, that "in the field of public education the doctrine of separate-but-equal has no place."[43] Thus, the Houston-Marshall strategy remained on track into the 1970's, in spite of the stubborness of its foes.

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41. Hirt, *Current Federal Policies on School Desegregation: Constitutional Justice or Benign Neglect?*, 13 URB., (1981) (Special Issue).

42. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971). In this case Chief Justice Burger also spelled out the range of techniques which were among those available to district courts in devising segregation plans: majority to minority transfers; student reassignment, with or without transportation; magnet schools; desegregation site selections; boundary changes; feeder pattern changes; and grade structure changes.

43. Brown v. Bd. of Educ., 347 U.S. 483, 495.

III. The North

While attention was focused on desegregation attempts in the South, the rampaging segregation in schools in the North and the West was not going unnoticed. Many thought *Brown*'s reach went no further than the States of the Old Confederacy, the Border states, and the District of Columbia. Since States in the North and West, to the extent pupils were racially separated in their schools, did not constitutionally or statutorily mandate such separation, there was not it was contended, an affirmative duty to correct this "de facto" condition. Those with this view were backed up by appellate court decisions in such cases as *Bell v. School of City of Gary*[44], *Deal v. Cincinnati Board of Education*[45] and *Craggett v. Cleveland Board of Education*, [46] among others.

Nevertheless, pressures continued to mount from "realists" who were convinced that with respect to public schools, the distinction between "de facto" and "de jure" segregation was illusory. Yet, if the segregated condition, however it's origins were denominated, was to be successfully exposed so as to invoke the remedial power of the federal courts, a theory would have to be developed that would recognize and overcome the hurdles erected by the courts, illusory or not.

By the early 1970's, a number of cases brought in the North were also beginning to reach the decisional point. In 1970, Judge Damon Keith ruled against the Pontiac School Board and in favor of black plaintiffs.[47] A similar result was obtained in Pasadena.[48]

Also of significance was *Lee v. Nyquist*.[49] In that case, a three-judge panel of the federal court struck down a New York state statute that prohibited state education officials from assigning students to schools in such a way as to enhance racial balances. At about the same time the landmark case of *Keyes v. School District No. 1*[50] was filed and ultimately decided by the United States Supreme Court.

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44. Bell v. School Bd. of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

45. Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

46. Cragget v. Cleveland Bd. of Education, 338 F.2d 941 (6th Cir. 1964).

47. Davis v. School Dist. of Pontiac, 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

48. Spangler v. Bd. of Educ., 311 F. Supp. 501 (D.C. Cal. 1970), *intervention denied*, 427 F.2d 1352 (9th Cir. 1970) *cert. denied*, 402 U.S. 943 (1971).

49. 318 F. Supp. 710 (W.D.N.Y.) (three-judge court), *aff'd*, 402 U.S. 935 (1971).

50. 413 U.S. 189 (1973).

This case followed *Brown* principles and held that a presumption of system-wide segregative intent arises where proof of intentional segregation in a significant portion of the system is shown and remains effectively unrefuted. *Keyes* was a landmark decision and greatly aided plaintiffs who sued urban northern systems with their multiple schools districts.

Before any remedy could be obtained, plaintiffs had to prove intentional acts of segregation in these Northern systems. Even with the *Keyes* presumption, this proved to be more of a task than individual, often impencunious plaintiffs could meet. Requests for assistance were made to organizations, in the same manner as was done when Charles Houston was tackling the segregation at the graduate and professional school levels in the 1930's and 40's. Complicating the problem for black plaintiffs was the range of tools with which school officials could arm themselves. They had, for example, the financial resources to employ top legal talent, ready access to the media, and the ability to exert considerable political leverage. They could engage in forceful legal resistance in the courts, and ignite, through the use of such "buzz" terms as "forced busing" and "white flight," backfires even within the minority community.[51] Nevertheless, the desire by plaintiffs to challenge segregation in the public schools moved forward.

As I earlier noted, the inflammatory and devisive issue in the early 1970's was clearly that of "busing." Fortunately, plaintiffs, with few exceptions, refused to capitulate. The wonder is, that more did not, given the climate that was created. It was not until the *Bakke*[52] affirmative action controversy that many blacks and others who had been "taken in" on the "forced busing" issue, began to understand that as a remedial tool, busing was indivisible from remedial techniques needed to correct other forms of discrimination. They came to understand that to equivocate on the "busing" issue in school desegregation cases, was to create a vulnerability for the remedies needed in the related areas of employment, housing, voting rights and the entire array of affirmative action programs. They

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51. Testimony, Green, Robert L., Reed v. Rhodes, 422 F. Supp. 708 (N.D. Ohio 1976), *aff'd* 662 F.2d 1219 (6th Cir. 1981), *cert. denied sub. nom.* Ohio State Bd. of Educ. v. Reed, 455 U.S. 1018 (1982). Green, *School Desegregation and Its Effects: An Introduction*, 13 URB. 51 (1981). Center for National Policy Review, *Justice Delayed & Denied* (September 1974). *Desegregation of the Nation's Public Schools: A State Report*, U.S. COMMISSION ON CIVIL RIGHTS (1979). Polsby, *The Desegregation of School Systems: Where the Courts are Headed*, 10 URB. 136 (1978).

52. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

came to realize that the problem was race - not a bus - since white pupils by the thousands had been and were still being transported by bus. The *Bakke* and other affirmative action cases demonstrated that where the remedy was racial in its objective, resistance was certain to follow. The real heroes of the 1970's are those litigants, students, parents, and judges who did not and still do not compromise on the issue of remedy.

As we explore the actions of the 1970's aimed at overcoming racial segregation in urban schools, particularly in the North, it is helpful to understand the strategies that evolved. First, it must be noted that in taking on urban or metropolitan school systems, where plaintiffs were required to prove intentional racial discrimination by public officials, an enormous allocation of resources was necessary, as was the development of specialized skills beyond that usually relied upon in the ordinary civil rights case. The metropolitan or interdistrict approach to school desegregation posed an even more complex set of problems for litigators in the 1970's. The Detroit experience best demonstrates those complexities.[53]

Even in the single district school cases, proving a case required more resources than most plaintiffs could provide. For instance, plaintiffs had to make a historical analysis of prior school policies of construction, boundary changes, grade level and feeder pattern changes, faculty assignments, and other other administrative practices. Establishing the "interdependence" of housing segregation and employment discrimination as they affected school policies proved to be complicated, expensive, and time consuming. These efforts, when undertaken, permitted the presentation to courts of proof which led to a long string of significant victories.[54] These cases brought by pri-

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53. At the time the NAACP initiated the case of Milliken v. Bradley 418 U.S. 717 (1974), it had no indication of the ultimate course the case would take, nor of the expense involved. Until that time, no private plaintiffs had undertaken a northern school desegregation case of that magnitude. Given the mixed signals from the courts regarding the legal standards against which racial segregation in the north was to be measured, plaintiffs counsel decided it advisable to attempt to demonstrate "state action" causation. Too much can not be said for the legal acumen and resourcefulness of such lawyers as J. Harold Flannery, Louis R. Lucas, Paul R. Dimond, Thomas I. Atkins, William E. Caldwell, Norman J. Chachkin, and Robert Pressman, Elliott Hall, and E. Winther McCroom also lent assistance.

54. *E.g.* Ohio State Bd. of Educ. v. Reed, 455 U.S. 1018 (1982); Brinkman v. Dayton Bd. of Educ. 433 U.S. 406 (1977), *vacating and remanding*, Brinkman v. Gilligan 539 F.2d 1084 (6th Cir. 1976); Caulfield v. Bd. of Educ. 632 F.2d 999 (2d Cir. 1980); Hart v. Community School Bd. 512 F.2d 37 (2d Cir. 1975); Tasby v. Estes 517 F.2d 92 (5th Cir. 1975), *cert. denied*, 423 U.S. 939 (1975); Berry v. Benton Harbor School Dist. 505 F.2d 238 (6th Cir. 1974); Morgan v. Kerrigan 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Oliver v. Michigan State Bd. of Educ. 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S.

vate parties kept alive the drive for desegregation during periods, particularly the early 1970's, when the federal government was hostile to these attempts. Plaintiffs, for the most part, had to carry the battle alone, often in the face of this governmental opposition. Though the Nixon and Ford administrations professed support for *Brown I*'s holding, they resisted the remedies that were necessary to give it meaning. When the Carter Administration came to power in 1977, the Justice Department and the Office of Civil Rights of HEW took a more cooperative stance. By this time, however, Congress had badly crippled the administrative capacity to desegregate through the enactment of a number of anti-busing amendments.[55]

One of the most intriguing strategies conjured up by anti-busing forces involved the Seattle and Los Angeles school districts. Through the use of state wide initiative and referendum, the use of busing in Seattle was attacked, and the state constitutional standard required to obtain a remedy in California courts was changed.[56]

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963 (1975); Pride v. Community School Bd., 482 F.2d 257 (2d Cir. 1973); Penick v. Columbus Bd. of Educ. 429 F. Supp. 229 (S.D. Ohio 1977), *aff'd*, 443 U.S. 449 (1979); Arthur v. Nyquist, 415 F. Supp. 904 (W.D.N.Y. 1976); Reed v. Rhodes 422 F. Supp. 708 (N.D. Ohio 1976), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied sub. nom.*, Oliver v. Kalamazoo 346 F. Supp 766 (W.D. Mich. 1971), *aff'd*, 448 F.2d 635 (6th Cir. 1971).

There were also set backs, *e.g.* Alexander v. Youngstown, 675 F.2d 787 (6th Cir. 1982); Bell v. Akron Bd. of Educ. 683 F.2d 963 (6th Cir. 1982); Higgins v. Bd. of Educ. 395 F. Supp. 444 (W.D. Mich. 1973) *aff'd*, 508 F.2d 779 (6th Cir. 1974).

55. As an administrative means of blocking effective desegregation. Congress, under the provision of Title VI, encumbered various appropriations bills with riders that precluded or severely limited the ability of the Office of Civil Rights (O.C.R.) to incorporate busing as a part of desegregation plans. The Mansfield-Scott, Byrd and Eagleton-Biden Amendments proved most inhibiting. An effort to challenge the constitutionality of these actions was rejected, for the moment, by the U.S. Court of Appeals of the District of Columbia because the O.C.R. retained the option of referring cases to the Justice Department for prosecution in the federal courts.

Efforts persisted to enact other anti-busing amendments. During 1979, for example, members of the Congress introduced eight bills that would have had the effect of bobbling the school desegregation capacity of O.C.R. Four of them were defeated. They included:

1). The Collins Amendment, H.R. Res. 4392, 96th Cong. 1st Sess. 125 Cong. Rec. 5843 (1979).

2). The Mottl Constitutional Amendment H.R.J. Res. 74, 96th Cong. 1st Sess, 125 Cong. Rec. 132 (1979).

3). The Ashbrook Amendment H.R. 2444, 96th Cong., 1st Sess. 125 Cong. Rec. 5725 (1979).

4). The Walker Amendment, 2444, 96th Cong. 1st Sess. 125 Cong. Rec. 5725 (1979).

See also Citizen Comm'n on Civil Rights, *There is No Liberty. . .*, A Report on Congressional Efforts to Curb the Federal Courts and To Undermine the Brown Decision,(1982).

56. California, after years of being a trailblazer in school desegregation, recently through the initiative process, amended its state constitution to limit state courts to the federal *intent* standard, thereby rejecting its previous "effects" test which had been reflected in such

Equal in drama and import to all that developed in the West in the school desegregation area during the 1970's and 80's were the events in Michigan, Ohio, and Massachusetts. Interesting remedial principles were honed and reaffirmed.

Michigan

In June of 1970, shortly after Governor William Milliken signed into law Michigan Act 48, which suspended a voluntary desegregation plan of the Detroit Board of Education, the Detroit Branch of the NAACP sought assistance in filing suit to enjoin the enforcement of the law. Detroit School Board members who had voted for the plan were targeted for recall and were in fact removed from office. When their replacements took over the new majority chose to put in place a magnet plan that would have perpetuated pupil segregation. Following a meeting with lawyers for the plaintiffs and the school board, it was decided to initiate a lawsuit to enjoin the enforcement of Act 48 and compel a re-activation of the suspended desegregation plan. That was the beginning of *Milliken v. Bradley*.[57] The late Judge Stephen Roth of the U.S. District Court for the Eastern District of Michigan was presented with the application for a temporary restraining order and a preliminary injunction. He reacted with some hostility. Upon denying the request for a TRO, he scheduled a hearing on the preliminary injunction request. After hearing testimony, Judge Roth denied the plaintiffs any relief, whereupon the latter filed an immediate appeal to the United States Court of Appeals for the Sixth Circuit. The appellate court agreed with the plaintiffs that Act 48 was unconstitutional. The Act interfered with local attempts to comply with the Constitution's equal protection clause as determined in *Brown* in the same manner as had been done in the South. The case was remanded for further proceedings.[58]

Ultimately, the case went to trial. During the trial, which lasted for 41 days, the hostility of Judge Roth melted and he was sufficiently impressed with the plaintiffs' evidence to find against the Detroit Board of Education and the State of Michigan. On September 27, 1971, Judge Roth held:

> Pupil racial segregation . . . and the residential racial segregation resulting primarily from public and private racial dis-

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case law.

57. Milliken v. Bradley, 418 U.S. 717 (1974).

58. Bradley v. Milliken, 433 F.2d 897, 905 (1970).

> crimination are interdependent phenomena. The affirmative obligation of the defendant board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation. The Board's building upon housing segregation violates the Fourteenth Amendment.[59]

This case was hailed as a pivotal development in the battle against school segregation. It indicated a possible formula for breaking the back of northern urban segregation by linking educational and residential segregation.

On appeal, the U.S. Court of Appeals for the Sixth Circuit, sitting *en banc*, upheld Judge Roth's findings. The Sixth Circuit reached the following conclusion:

> This record contains a substantial volume of testimony concerning local and state action and policies which helped produce residential segregation in Detroit and in the metropolitan area of Detroit. In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped to cause or maintain such segregation.[60]

With regard to the need for interdistrict relief, the appellate court held that the only feasible desegregation plan involved crossing the boundaries between the city and suburban school districts. The court found that an effective desegregation plan required a disregard of artificial barriers, especially where, as here, the state had helped create and maintain racial segregation within the barriers. Liability having been found, all-out relief required an interdistrict approach. According to the court:

> The instant case calls up haunting memories of the now long overruled and discredited 'separate-but-equal' doctrine of *Plessy v. Ferguson*. If we hold that school district boundaries are absolute barriers to a Detroit School desegregation plan, we would be opening a way to nullify *Brown v. Board of Education* which overruled *Plessy*.[61]

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59. Bradley v. Milliken, 338 F. Supp. 582, 593 (E.D. Mich. 1971).
60. Bradley v. Milliken, 484 F.2d 215, 242 (1973).
61. *Id.* at 249.

The United States Supreme Court in a 5-4 decision, affirmed the district court and the Sixth Circuit with respect to intradistrict segregation, but it reversed the portion of the holding dealing with the propriety of an interdistrict remedy. Writing for the majority, Chief Justice Warren Burger declared, "We conclude that the relief . . . was based upon an erroneous standard and was unsupported by record evidence that acts of the outlying districts effected the discrimination found to exist in the schools of Detroit."[63] This conclusion was possible once the Court rejected the notion of state control over education in Michigan. It thereby attributed to the local educational administrative units which the State created, i.e., school districts, a degree of autonomy heretofore unrecognized, even in Michigan. This was a limitation on the reach of *Green* and *Swann*.

Justice Potter Stewart, who provided the crucial fifth vote, concurred. He outlined circumstances which to him would have led to an approval of an interdistrict remedy. To the confoundment of many, he characterized the containment or segregation of black children within Detroit as caused by "unknown and perhaps unknowable factors. . . ."[65] He could not find anything in the record that would lead to a conclusion that "the State or its political subdivisions have contributed to cause the situation to exist,"[64] or that the situation was caused by "governmental activity."[65]

While this case was a serious setback, it did not block the efforts to proceed against segregation within single school districts. In a number of instances in Michigan and elsewhere with generally favorable results,[66] single district cases were brought.

After going back to the trial court for the fashioning of an intradistrict remedy, the case found its way back to the Supreme

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62. Milliken v. Bradley, 418 U.S. 717, 752 (1974).

63. *Id.* at 756, n.2.

64. *Id.* at 756-57.

65. Justice Stewart recognized in his concurring opinion that imposition of an interdistrict remedy would be appropriate "[w]ere it to be shown, for example, that state officials had contributed to the separation of the races . . . by purposeful racially discriminatory use of state housing or zoning laws. . . ." 418 U.S. at 755. Plaintiffs argued that the record contained just such a showing.

66. At least six of the other school districts in Michigan subjected to judicial inquiry were found guilty of maintaining pervasive racial discrimination with respect to the assignment of pupils or staff or both. United States v. School Dist. of Ferndale, 616 F.2d 895 (6th Cir. 1980); NAACP v. Lansing Bd. of Educ. 581 F.2d 115 (6th Cir. 1978); Berry v. School Dist. of Benton Harbor 505 F.2d 238 (6th Cir. 1974); Davis v. School Dist. of City of Pontiac 309 F. Supp. 734 (E.D. Mich.) *aff'd*, 443 F.2d 573 (6th Cir. 1971); Higgins v. Bd. of Educ. of Grand Rapids 395 F. Supp. 444 (W.D. Mich. 1973); Oliver v. Kalamazoo Bd. of Educ. 346 F. Supp. 766, (W.D. Mich. 1971) *aff'd* 448 F.2d 635 (6th Cir. 1971).

Court as *Milliken II*.[67] The issue on this appeal was whether the State of Michigan, having been found culpable for maintaining segregation within Detroit along with the local board, could be required to share in the cost of the remedy. Specifically, the Supreme Court addressed the issue of the Eleventh Amendment and the State's contention that it was shielded by that Amendment from having to pay from the treasury the funds ordered by the district court and affirmed by the Court of Appeals. The Court held that the State, having been found liable, could be required to help pay the cost of remedying the dual system, and this extended to underwriting the cost of ancillary educational relief. Thus, the State was ordered to pay one half of the $56 million vocational programs and to make annual payments of $5.8 million for such educational relief as in-service training, reading programs, guidance and counseling, and community relations.

The implications of *Milliken II* seem to be lost on those who continue to argue that school desegregation is a waste of money, and does nothing to enhance the quality of education being offered minority children. There is no doubt that without the Court orders here, the programs developed as a part of ancillary relief would not have been forthcoming; nor would the infusion of state funds have resulted. *Milliken II* has proven to be the basis for a number of subsequent courts to order ancillary relief with states being required to contribute substantial sums of money.[68]

Ohio

Ohio was targeted for considerable desegregation attention during the 1970's, in great measure because of the large numbers of cities with significant numbers of minority children locked into seg-

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67. Milliken v. Bradley 433 U.S. 267 (1977).

68. In *Milliken II*, the Supreme Court reconfirmed with firm language, its consistent view of widespread manifestations of intentional school segregation: "discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual school system founded on racial discrimination." 433 U.S. 267, 283 (1977). Noting some of the "inequalities . . . which flow from a long standing segregation system," the Court found:

> Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community.

Id. at 287. Clearly the *Milliken II* court held that to the extent these personal variations exist in the segregated pupils, those responsible for maintaining the segregation must fashion ancillary programs of remedy as a part of the affirmative duty to eliminate, "root and branch" all remnants of the dual system.

regated schools.[69] Cases were filed in Dayton, Cleveland, Columbus, Youngstown, Akron, Lorain and Alliance. Also, the Justice Department sued the Lima school district. *Dayton v. Brinkman*[70] went to the United States Supreme Court twice. *Penick v. Columbus*[71] also drew Supreme Court attention on two occasions. The decisions handed down by the Supreme Court in the 1979 Dayton and Columbus cases were significant in that they clarified the permissible scope of an intradistrict remedy. There was confusion on this point after *Dayton I*'s remand, growing out of an unclear record.[72] All doubt was removed in *Penick v. Columbus* and *Dayton v. Brinkman II*.[73] Subsequently, the issue of state liability for segregation within a local school district was addressed by the Sixth Circuit in the Columbus case. The Cleveland case, *Reed v. Rhodes*,[74] joined Boston in being the cases in which federal courts were compelled to supplant the power of local school officials due to their inability or refusal to comply with court orders. At one point, U.S. District Judge Frank J. Battisti declared:

> This court had no desire to administer the Cleveland school system or inquire into the fiscal affairs, but rather was drawn inexcusably into these complex issues by the defendant's incapacity to plan and prepare for desegregation and their repeated claims of inability to desegregate because of lack of funds.[75]

A development in *Penick*, the Columbus case, which drew considerable comment was the "stay" ordered by Justice Rehnquist in 1978. After the Sixth Circuit's affirmance of Judge Robert M. Duncan's liability decision and the order affirming a desegregation

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69. The HEW/OCR Directory of Public Elementary and Sunday Schools in Selected Districts, Fall, 1970 (1972) as reported in Center for National Policy Review's Study, *Justice Delayed and Denied*, Sept. 1974, included three Ohio unreviewed cities, Columbus, Youngstown and Akron.

The total enrollment in Columbus was 109,329, with the minorities constituting 29,847 or 27.3% of the total. Yet, 72.9% of the minority pupils were in schools of from 50-100% minority. In Youngstown, the following condition was reflected: 11,924 minorities or 47.5% of the total enrollment of 25,097. Ninety-three per cent of the minorities were in the 50-100% minority schools. In Akron, minority students numbered 15,456. This was 27.6% of the total enrollment of 56,426, with 63.1% of them being isolated in the 50-100% minority schools.

70. 433 U.S. 406 (1977), 443 U.S. 526 (1979)

71. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979)

72. 433 U.S. at 412-14.

73. 443 U.S. 449; 443 U.S. 526.

74. 422 F. Supp. 708 (N.D. Ohio 1976), *aff'd* 662 F.2d 1219 (6th Cir. 1981), *cert. denied sub. nom.*, Ohio State Bd. of Educ. v. Reed, 455 U.S. 1018 (1981).

75. Reed v. Rhodes, No. C-73-1300 (N.D. Ohio) (unpublished order).

plan, Circuit Justice Potter Stewart denied a stay application. The Columbus officials thereupon proceeded, days before the opening of Columbus schools, to obtain one from Justice William H. Rehnquist. In granting it, Justice Rehnquist intimated that the *Columbus* case had the same flaw as *Dayton I*, i.e. that the system-wide remedy exceeded the "isolated" violations found. It was later determined by the full court, when it considered the case on the merits, that Justice Rehnquist was incorrect. It should also be noted that the record even in *Brinkman I* contained proof of violations that were system-wide in their effect. This, under *Keyes*, justified a system-wide remedy. Fortuitously, when these cases went forward, the Justice Department's civil rights posture, under Assistant Attorney General Drew Days and Solicitor General Wade H. McCree, Jr., was one of support for desegregation. In fact, Days argued in behalf of the United States as amicus curiae.

The Cleveland Experience

The case of *Reed v. Rhodes*[76] produced a record replete with segregative intentional actions by the Cleveland Board of Education. The liability phase of the trial elicited page after page of findings which demonstrated conscious racial actions by the Cleveland School Board, the Superintendant and staff. So extensive and wide ranging was the proof that reliance on the *Keyes* presumption was not necessary to establish system-wide impact.

During the several years preceding the filing of the complaint in 1973, a number of ameliorative steps were taken by the school board and Superintendant in the area of faculty and staff desegregation. Nevertheless, virtually nothing was done to relieve the pronounced pattern of pupil segregation. School officials freely conceded the fact of pupil segregation but attributed its cause to housing patterns. There was proof offered of the way in which the board's policies and the housing policies of the city interacted and became interdependent. It was the pervasiveness of pupil segregation[77] that led the

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76. *See id.* at 67.

77. Chief Judge Battisti noted in Reed v. Rhodes, 422 F. Supp. 708, 711 (1976) that:
Examining the percentage of black students attending regular schools which were one-race schools (90% or more one race) in various years indicates that from 1940 to 1974, there was a steady trend toward concentration of black students in segregated schools:

1940: 51.03%
1950: 58.08%
1955: 57.72%
1960: 76.03%

school officials to argue that they were immune from a Court-imposed remedy because the remedy would have to be too extensive. They testified that to dismantle the dual system which the proof showed to be in place would be too expensive and require what they called "massive cross town busing." No one wanted this, they contended, including black parents.

This was a novel defense to a desegregation remedy. It complicated a situation in which the public was constantly advised that, in spite of the Court's extensive findings on liability and causation, an extreme and unfair invasion of their constitutional rights by a federal judge was taking place. Of virtually little, or no concern to the school officials was the proof which established that the extent of harm to the victims of the segregation was so deep that serious ancillary relief in the form of special education components would be required if the vestiges of the dual system were to be removed "root and branch."

The findings of the district judge on liability were upheld on appeal. The court's remedial orders with several exceptions were also upheld. These included orders for the appointment of a Special Master, Deputy Superintendant for Desegregation Implementation, and a desegregation monitoring committee. The ancillary relief and the other aspects of the remedy required were to be the joint financial responsibility of the State and the local board. In the process the Court, at several junctures, virtually placed the system in receivership. The State, due to the chaotic condition of Cleveland's finances, had to oversee much of the school district's operations.

One of the interesting developments in the *Reed v. Rhodes* case was the way in which powerful segments of the black community were used by the local defendants in an effort to shield them from their responsibility to desegregate.[78]

The Boston Experience

The issues in the Boston school desegregation case, *Morgan v.*

1970: 90.00%
1975: 91.75%

78. The record in Reed v. Rhodes shows that the Cleveland School Board orchestrated an effort at having several black parents file an intervention motion which asserted that they and others were satisfied with the conditions existing in the Cleveland schools. The Court, following a brief hearing, emphatically rejected the motion. A black-owned weekly newspaper and its publisher were frequently critical of the plaintiffs for pursuing the claims against the Cleveland School Board. On the eve of trial, at a meeting convened by the publisher of the newspaper, abuse was heaped upon the plaintiffs' counsel and the white members of plaintiffs' legal team were expelled.

Kerrigan,[79] were played out on several stages. At one point, the conference room of the Attorney General of the United States, Edward Levi,[80] was the setting for the drama. A week later it was the White House with President Ford presiding.[81] *Morgan*, decided in 1974, will be remembered as the case in which official school board resistance was reinforced by the most violent white citizen opposition since Little Rock, surpassing even the violence which accompanied Judge Keith's orders in the Pontiac case.

Because of the intransigence of the elected School committee and the entrenched nature of the segregation, U.S. District Judge W. Arthur Garrity's remedial orders were the most comprehensive to be handed down by a federal judge in a northern school desegregation case. Not only was system-wide desegregation ordered, but a network of magnet schools, city-wide in scope, was established whose enrollments were carefully controlled. Further, historic city-wide "examination" schools were ordered desegregated, a business-high school pairing was required, and each school was directed to establish a racial-ethnic parents council. Among other remedies ordered by Judge Garrity were the development of a comprehensive vocational program, creation of a department of desegregation implementation and a city-wide monitoring commission. As the desegregation process gradually moved forward, firm resistance remained at South

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79. 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

80. On May 14, 1976 Roy Wilkins, Executive Director of the NAACP, in a telegram to Attorney General Edward Levi, expressed his dismay at reports that the Solicitor General of the United States was prepared to intervene in the Supreme Court on the side of the Boston School Committee. Wilkins asserted that:

> Seeking Supreme Court review of a case with a record so marked with defiance, recalcitrance and violence by school officials and street mobs, particularly ensures continued undermining of the judicial process.
>
> I urge that if the Department does intervene, it does so in support of the rulings of courts below, where the issues have been thoroughly litigated.

Following the message, the then U.S. Senator from Massachusetts Edward Brooke and William Coleman, Jr., Secretary of Transportation, urged the Attorney General to receive a delegation of civil rights leaders headed by Wilkins and Clarence Mitchell. Brooke told Steve Wermil of the BOSTON GLOBE that when he informed President Ford about the contemplated Justice Department Action, "I could tell he did not know about the government position." The President said to Brooke, "Ed, certainly this has not been done with my consent or direction." The meeting was held at which time Clarence Mitchell, Jr., Director of the NAACP, Washington Bureau, and I, made presentations. Mitchell was quite strong in reminding the Attorney General of his past efforts with former Attorneys General Herbert Brownell and others, to bring about laws permitting the Justice Department to intervene in cases on behalf of victims of discrimination. He pointedly noted that the steps contemplated by the Justice Department were at total variance with that duty.

81. The delegation meeting with President Ford consisted of civil rights, religious, educational and labor leaders, headed by Roy Wilkins and Clarence Mitchell.

Boston High School, which was ultimately placed in receivership.

Opponents of desegregation took their fight into the political arena where it reached the Justice Department and the White House. Fortunately, the forces that came together to oppose the efforts to have the Justice Department intervene in the Supreme Court on behalf of the anti-busing groups prevailed. Consequently, there was no intervention, and the Supreme Court allowed the desegregation orders to stand.

As a part of the political debate over the Boston case, adherents had to join issue with anti-busing groups in the media. Editorialists and TV news casters used careless terminology which served to mischaracterize the issue. William Raspberry, a *Washington Post* columnist, penned a number of columns on the issues in the Boston case. His January 6, 1975 column, in which he responded to one of my statements, points up the nature of the debate:

> "The central issue present in the Boston (busing) case," the NAACP's Nathaniel R. Jones was saying the other day, "is whether lawful orders of a federal court, now affirmed by a unanimous Court of Appeals, are going to be obeyed, or whether the integrity of those orders will be flouted by hostile mobs."
>
> Well, that certainly is an important issue, and it was because of that issue that I criticized President Ford for telling an October press conference that he was opposed to "forced busing as a solution to quality education" and that he continued to "respectfully disagree with the judge's order."
>
> I thought that Mr. Ford, as the nation's No. 1 leader, might more usefully have urged black and white Bostonians to obey the law, just as President Eisenhower did when Little Rock was the focus of school integration.
>
> But to acknowledge that obedience to the law is an important issue is not necessarily to agree with Nathaniel Jones that it is the central issue.
>
> The central issue for me, and presumably for black Bostonians and black Americans generally, is how to improve to the greatest extent possible the education of our children.
>
> Whatever else is involved in Boston, it was the desire to enhance the education of black children that led to Judge Garrity's decision and the resultant chaos.
>
> That is not to deny that white racism is the major reason for the racial isolation of Boston school children, for the poor education black children are getting in Boston or for the

present chaos. It is simply to ask whether the tactic chosen by black Bostonians was one that promised any useful result. From their point of view.

I think not. It isn't that Judge Garrity gave the wrong answer. It is that black Bostonians asked the wrong question. They asked what was responsible for their children's racial isolation and for their inadequate education. The answer: white racism.

But there is another question that might be somewhat more relevant. And that is:

What do we do about it?

If anything is clear it is that the altogether too-predictable reaction of white Bostonians to the Garrity decree is not doing anything for the education of black children, or any other children, for that matter. Only lawyers can take any comfort in the fact that it isn't the fault of the black plaintiffs that Garrity's decree has produced not quality education but only chaos.

The decree is a *fait accompli*, and if Boston were the only city involved, it would hardly be worth talking about now. But the issue that was the trigger for Boston is endemic in the country, and it bids fair to wreak havoc across the country, unless black people decide what they really want.

Talk to black parents in Boston and wherever busing suits have been brought, and they will tell you that their concern is not so much racial integration but better education for their children - a fair allocation of the school system's resources and services. In fact, aside from the leadership of the NAACP, it is hard to find black Americans who consider racial integration per se as of overriding importance.[82]

It is evident from reading Mr. Raspberry's lament that the scope and nature of the remedies ordered by Judge Garrity, which contained a variety of educational components, had eluded him. This oversight was not singular to him. Others failed to note that built into desegregation decrees were features aimed at improving educational quality for minority children in the desegregated environment.

In this connection it must be noted that one of the most appealing arguments raised in opposition to the decrees was that desegregation was at war with quality education. It was suggested that the

82. WASHINGTON POST, Jan. 6, 1975, at A-19, col. 3.

choice was either desegregation *or* quality education. Parents were asked to take their choice. Questions of pollsters were inevitably framed in such a way as to elicit responses that would confirm mass belief in the incompatibility of desegregation and quality education. From there, it would be contended that courts and communities should opt for quality education rather than desegregation. This concern by parents was shrewdly exploited, as were fears about "forced busing" and "white flight."

The foregoing is merely one example of the strategies which tended to divide those who had a fundamental abhorence of racial segregation. When the issue was cast in that form, the stark evil of racial segregation was considerably obfuscated. Efforts to desegregate became a war of attrition, with scarce resources and valuable time being spent in overcoming the diversions. Given that resources were unevenly divided between minority plaintiffs' counsel and their adversaries, the former was at a distinct disadvantage.

IV. The Disparity of Resources

Just as delay was an ally to those who opposed desegregation in the South, the overwhelming scope and depth of segregation in the North served as a justification for leaving the situation untouched. Nowhere was this more evident than in Chicago and New York. It was contended that the segregation there was too deeply rooted and pervasive for school boards and courts to do anything about it. The steps taken to deal with the problem in New York City schools were generally limited to individual schools in a community school district,[83] or to those instances when the Office of Civil Rights conducted compliance reviews and threatened fund cutoffs unless steps were taken to deal with segregation among faculty and administrative staffs.[84]

The system-wide nature of segregation in the larger districts was challenged in some instances, in spite of the magnitude of the problems and the costs involved. The earlier reference in this paper

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83. *See* Hart v. Community School Bd. 512 F.2d 37 (2d Cir. 1975). *See also* Proceedings, Conference on Public Policy and Education: The Making of Policy. Case Study: *The Impact of Office of Civil Rights on Local Policy Making in Education*, Center for Advanced Study in Education, The Graduate School and University of the City of New York.

84. While Ohio, in 1887, repealed its school segregation law and attempted to legislate the abolition of separate schools for white and black children, the statute was revived the following year by the Ohio Supreme Court in Board of Education v. State 45 Ohio 555, 16 N.E. 373 (1888). The effects which the 1887 action were targeted at, remained unattenuated until court decrees in such cases as *Brinkman*, *Penick* and *Reed*.

to *Milliken v. Bradley* is one example. The cases brought in Ohio, however, demonstrate in a most telling way a problem that has plagued desegregation attempts since the days of Charles Houston. It is the problem of litigation costs that must be met by those who challenge segregation. Not only must the challengers meet the issue of segregation, they are forced to operate with limited funds while their adversaries drew on the public purse to defend the system. I found this to be a most pressing and persistent problem during the years I served as General Counsel of the NAACP. The burdens imposed on plaintiffs in Northern cases, where plaintiffs have the burden of proving "de jure" causation, and the resources needed to ferret out the historical facts, make it an impossible task, unless special funding is provided by national organizations. School segregation would not have been under attack to the extent it has been over the past two decades in the North, without such groups as the NAACP, Harvard Center for Law and Education, Legal Defense and Education Fund, Lawyers Committee for Civil Rights Under Law, MALDEF, Puerto Rican Legal Defense Fund, and a small number of others. With regard to Ohio, however, it was the NAACP that pressed the cases. The guiding hand of Thomas L. Atkins, who became its General Counsel,proved to be indispensable in these and other cases.

The Ohio General Assembly, in 1978, appointed a Joint Select Committee on School Desegregation to look into various aspects of Ohio's problem. The Committee, headed by State Senator Morris W. Jackson of Cleveland, conducted an in-depth study and made a series of recommendations for statutory and administrative changes to the Ohio General Assembly. Of note, however, was what the Committee found with respect to the amount of tax funds that were being expended to defend the state in school desegregation suits in Ohio. In the table below taken from the Report of the Joint Select Committee on School Desegregation, it was shown that as of 1979, the State of Ohio had paid $569,739.46 for attorneys fees, transcripts and court costs. While the study did not include figures for outlays by all individual school districts in Ohio, it did include the following Cleveland and Columbus expenditures:

CLEVELAND*		COLUMBUS*	
Calendar Year		Calendar Year	
1973	$ —	1973	$ 6,274
1974	23,792.64	1974	30,737
1975	164,531.20	1975	27,118
1976	326,537.19	1976	168,540
1977	364,846.79	1977	188,339
1978**	234,272.32	1978**	70,548
	$1,114,980.14		$491,556

*Does not include special master and expert fees (estimated at $450,000) and plaintiff's fees (not yet estimated). Court has ordered the state to pay for the master's fees.
**As of 9/78

*Includes attorney fees and court costs.
**As of 10/30/78.

As a co-defendant in most of Ohio's desegregation cases, the State Board of Education has had its own share of litigation costs, amounting to over one-half million dollars, as indicated by the figures in Table 2 below.

Between 1974 and 1978 inclusive, Cleveland paid out $1,113,980.14, and Columbus reported $491,556. On the other hand, plaintiffs had nowhere near that amount of money available to them.

What all this adds up to is that one of the strongest barriers to desegregation has been the high cost of challenging it. Through special grants from foundations and corporations, and the efforts of community groups, it was possible to sustain the private lawsuits. The research teams, experts and lawyers were often required to go long periods of time before being reimbursed for their out-of-pocket expenditures. At the same time, school board personnel made available as a defense resource, were on the public payrolls and the defense counsel were being compensated on a regular basis at their commercial rates. This serious disparity in available resources points up all the more why the federal government must assume its affirma-

tive duty to enforce *Brown* and the various statutes, including Title VI of the 1964 Civil Rights Act.[86]

V. Settlements and Impediments Thereto

Though settlements have been effected in a small number of school desegregation cases, they were attempted in several others. While the Atlanta Compromise, which led to the settlement of *Calhoun v. Cook* in 1973, and the settlement in Chicago in 1980, are still the subject of controversy,[86] other more recent settlements appear to contain features that ensure greater desegregation,[87] and guarantees of quality education.[88]

The Atlanta compromise represented a victory for disciples of delay and those prepared to substitute *Plessy*'s equalizationof separateness for *Brown*'s command to desegregate. Further, the manner in which the Compromise was struck and initially approved by the District Court without affording objecting class members an oppor-

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85. Dr. Robert L. Green, former Dean of Urban Affairs of Michigan State University, writing in 13 Urb., No. 2 (1981) delared that "There is no more significant social issue today than the desegregation of our public schools."

86. 362 F. Supp. 1249 (N.D. Ga. 1973), *aff'd*, 522 F.2d 717 (5th Cir. 1975). The New York Times' Paul Delaney on July 22, 1973, quoted me, speaking for the NAACP in the following account:

> "The plan sets the dangerous trend of accepting a policy," he said: that essentially leaves all-black schools intact."
>
> He listed two cases in the last week as examples. He said the United States Court of Appeals for the Sixth Circuit had approved a plan for Knoxville, Tenn., that did not require busing, and a district judge in Grand Rapids, Mich, had concentrated on a project to integrate the staffs of the school system rather than the pupils.
>
> "In the Grand Rapids case the school board introduced the Atlanta Compromise plan into the record," Mr. Jones said.

New York Times, July 22, 1973, at 19, cols. 1,2.

Also, Dr. John A. Morsell, Assistant Executive Director of the NAACP, said in a letter to the New York Times on April 25, 1973 that "The Atlanta Plan is in direct and irreconcilable conflict with basic NAACP policy, which calls for the maximum amount of desegregation possible wherever segregated systems are maintained. The Plan is also contradictory of the principle underlying the U.S. Supreme Court's seminal ruling in the *Swann* case."

Roy Wilkins, NAACP Executive Director, was quoted in the July 30, 1973 issue of Newsweek as also branding the compromise "an unholy mess of hope and fears." *New Deal in Atlanta*, Newsweek, July 30, 1973, at 42. The reaction was not unexpected, given that, under the settlement approved by the Court, 92 of the 148 schools in Atlanta were left 90% black.

87. *See* Bronson v. Bd. of Educ. of the City School Dist. of Cincinnati, 578 F. Supp. 1091 (S.D. Ohio 1984); Liddell v. Bd. of Educ. of St. Louis, 567 F. Supp. 1037 (E.D. Mo. 1983); San Francisco NAACP v. San Francisco Unified School Dist., 576 F. Supp. 34 (N.D. Cal. 1983).

88. San Francisco NAACP v. San Francisco Unified School Dist., 576 F. Supp. 34 (N.D. Cal. 1983).

tunity to engage in discovery, prompted the United States Court of Appeals for the Fifth Circuit to remand the matter with the following admonition:

> With no lack of sensitivity to the burdens imposed upon judges who are attempting to expediently conduct the business of a heavily burdened district court, such procedure cannot form the basis for adjudication of the merits of the complex issues in this litigation. A reasonable opportunity for discovery must be afforded. In addition, minimum procedural due process requires adequate notice of a hearing at which an opportunity will be afforded the parties to present sworn testimony and to cross examine witnesses who sponsor opposing views.[89]

The Atlanta Compromise was eventually approved by the District Court. The national office of the NAACP took the extraordinary step of expelling officers and the Board of the Atlanta Branch for endorsing and then refusing to repudiate the settlement. The terms of the settlement led to little or no desegregation of the system. It represented a political trade-off under which 83 of the 141 schools were left all black. Only eight schools became less segregated, and 3,000 of the 95,000 pupils were to be transported. Of that number only 800 were white. What blacks got for giving in on pupil desegregation were some jobs; one-half of the administrative positions as well as the superintendancy.

Another highly controversial settlement involved the United States Justice Department and the Chicago School Board. After many years of confrontation and contention between OCR, the NAACP, local minority groups, and the Chicago Board of Education, OCR, under Director David Tatel, undertook a compliance review. This review represented a thorough analysis of the history, policies and practices of the Chicago school system. Extensive findings were made which became the basis of settlement discussions between OCR and the Chicago Board of Education. Subsequent to the negotiations, the Department of Justice in 1980 filed a suit and requested the Court to approve a consent decree settling the suit. Though no plan was spelled out, the Board did agree to develop plans that would comport with applicable law and federal standards.

The high hopes once entertained for resolving the problems of school segregation in Chicago were dashed as political factors later

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89. Calhoun v. Cook, 487 F.2d 680, 683 (5th Cir. 1973).

intervened to send the Board of Education into different directions. Without detailing the ins and outs of the Chicago saga, the bottom line must be noted. The plan ultimately approved by the district court, without a mandatory backup, amounted to little more than *Plessy v. Ferguson*. Segregation remains. Disproportionate burdens are borne by blacks.

The settlement of *San Francisco NAACP v. San Francisco Unified School District*,[90] on December 30, 1982 represents one of the more positive developments in school desegregation. This settlement was arrived at with the help of a court-appointed Settlement Coordinator who worked for two months with the parties. The plan agreed upon is as noteworthy for its specifics as the Chicago settlement is for its vagueness. Included are specific racial targets for the various schools and linkage with universities and academic schools and many other ancillary remedies. Furthermore, the magnet schools are built around uniqueness. The state is also involved to a significant degree. For example, the state, under prevailing statutes, is obligated to fund court-ordered plans. The state is also required by the settlement to take steps to attempt to involve suburban school systems with monetary inducements.

Noting the importance that housing patterns play in shaping a school district, all parties in the San Francisco case committed themselves to take steps to block housing initiatives that would adversely impact or impede school desegregation, even to the point of joining in litigation. An expert on housing was to be hired by the San Francisco school board and paid by the state, whose responsibility it would be to monitor the development of housing.

St. Louis and Cincinnati - The Most Recent Developments

Charles Houston warned in 1935, that Negroes could not depend on judges to protect their civil rights but that minorities had to carry forward their own litigation in order to establish their rights. It can be said that the Houstonian approach and its success has actually made it possible for the judiciary to act more aggressively in declaring and protecting the rights of blacks and other Americans. Nowhere is this more apparent than in the school desegregation area. Now, thirty years after *Brown*, in spite of the frustrations, impediments and setbacks, some federal judges continue on the great tradition by vindicating constitutional rights, even when to do so is to

90. San Francisco NAACP v. San Francisco Unified School Dist., 576 F. Supp 34 (N.D. Cal. 1983).

go against popular, albeit mistaken, notions.

The role played by U.S. District Judge William Hungate and the interdistrict aspects of the St. Louis case,[91] affirmed substantially by the Eighth Circuit Court of Appeals,[92] as well as that played by U.S. District Judge Walter H. Rice in the Cincinnati school case[93], hold promise for the resolution of future litigation. Each of these judges took positive steps to effect settlements in very difficult and complex cases. Credit must also go, as the judges acknowledge, to the lawyers, negotiators, and school board members for their creativity and persistence in sticking with the process until it was successfully completed. Cases have also recently been settled in Nashville, Tennessee[94] and Yonkers, New York.[95]

St. Louis

A positive development occurred in the St. Louis case when the city board sought and obtained leave to realign itself as a plaintiff, which was a prelude to cross claiming for interdistrict relief. Given the state of the law, which imposes a clear duty to desegregate school districts, it is puzzling why more of them do not follow the example of the St. Louis Board. Once realigned, the city asserted that the defendants had perpetuated and exploited, with "segregative intent," and "segregative impact" a metropolitan-wide racially dual public education system. The city went on to allege that the defendants had failed to meet their *Brown II* duty to dismantle the dual system. In support thereof, allegations were made of discriminatory student assignment patterns, faculty salary disparities, governmental funding decisions, failures or refusals to consolidate school district boundaries and discriminatory housing and land use policies.

Pursuant to earlier mandates from the Eighth circuit Court of Appeals to proceed with interdistrict liability hearings, a trial date was set. It was at this juncture that Judge Hungate's crucial intervention occurred. This process eventually led to a resolution of the issues, but not before a postponement in the trial date was granted. On February 22, 1983, an agreement in principle was reached, followed by the Settlement plan filed by the Special Master. During a

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91. Liddell v. Bd. of Educ. of St. Louis, 567 F. Supp. 1037 (E.D. Mo. 1983).

92. 731 F.2d 1294 (8th Cir. 1984).

93. Bronson v. Bd. of Educ. of the City School Dist. of Cincinnati, 578 F. Supp. 1091 (S.D. Ohio 1984).

94. Kelley v. Metro. City Bd. of Educ. of Nashville, 687 F.2d 814 (1982), *cert. denied* 103 S. Ct. 834 (1983).

95. *Id.*

5-day fairness hearing, Judge Hungate received testimony and later found the settlement to be fair, reasonable and adequate.

The proposed Settlement Plan provides for:

(i) voluntary interdistrict transfers of students, with specified ratios and goals for the racial balance of student populations in participating districts;

(ii) a hiring and transfer program, with specified goals for the racial balance of administration and teaching staff of participating districts;

(iii) the establishment of specialized educational programs, including: programs focused on the all-black schools remaining within the City of St. Louis; magnets: part-time programs and cooperative programs with paired schools and with local cultural, civic, and business institutions;

(iv) provisions to insure equitable treatment of all students;

(v) one administrative body to coordinate and review implementation of the programs;

(vi) various enforcement and grievances procedures; and

(vii) an award of reasonable attorney's fees to the city Board, and plaintiffs.[96]

As the court pointed out, the settlement provides class members with "immediate, extensive opportunities to receive a quality education in a broad range of desegregated settings thoughout the St. Louis metropolitan area."[97]

The U.S. Court of Appeals basically affirmed the district court's approval of the plan. Of considerable importance is the portion of the order directing the State to fund in a significant way the costs of implementing this desegregation plan.

The Cincinnati Settlement

The settlement in *Bronson v. Cincinnati* culminated a long period of litigation over the problem of segregation in the Cincinnati schools. There were those who concluded that the decision in the earlier case of *Deal v. Cincinnati*[98] in 1966, wherein the segregation that did exist was held to be non-intentional, precluded any chance of the issues of segregation ever again being judicially addressed.

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96. Liddell v. Bd. of Educ. of St. Louis, 567 F. Supp. 1037, 1043 (E.D. Mo. 1983).
97. *Id.*
98. Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966).

However, in 1973, the NAACP filed a new suit against the Cincinnati Board of Education and suburban school districts. Late in 1983, Judge Rice dismissed the suburbs from the suit and directed that the trial proceed against the Cincinnatti district. A motion for reconsideration of the order of dismissal was filed by the NAACP and is pending. During the long period between the time of the filing of the suit in 1974 and the present, three significant events occurred. First, the Cincinnati Board of Education initiated magnet programs and alternative schools which led to a reduction in the degree of racial segregation of pupils, faculty and administrative staffs. Second, HEW impounded 3 million dollars in ESSA funds that had been earmarked for the district. Third, the Sixth Circuit and the District Court grappled with the complex problems of res judicata and issue preclusion resulting from the earlier Deal decision.

The presence of these three circumstances set the stage for serious settlement negotiations several weeks before the January 10 trial date. It appeared on the eve of the trial that the negotiations would be broken off. It was at that point that Judge Rice personally stepped into the negotiations and forced the parties to confront each other once again. He delayed the opening of the trial, at first from day to day, and later from week to week. Finally, on February 16, 1984, Judge Rice and the negotiators announced that a settlement had been reached.

The approach used to reach the settlement in this case deserves comment. Initially, Judge Rice asked Judge David Porter, who had presided over the case from its inception in 1974 until after he took Senior status, to act as mediator along with a representative of the Community Relations Service of the Department of Justice. The plaintiffs designated two negotiators who had prior civil right litigation and mediation experience. The school Board designated one of its members, a local lawyer, to join with its Superintendent to represent the local defendants. The state defendants were similarly represented by two negotiators. The plaintiffs and local defendants agreed to use the Tauber Index to reach a reduced level of segregation which the school board would have to accomplish over a period of seven years. Though the methods to be used were left to the discretion of the Board, the latter is committed to specific reductions in the segregation level. If after three and one half years it appears that the goal may not be reached, the court can intervene and direct the adoption of techniques that will achieve the required levels.

In the terms of the agreement, "Plaintiffs may initiate a proceeding on or after December 1, 1987 if they believe that there is no

a reasonably probability that CPS will succeed in reducing the Index . . . to the level required by the 1990-91 school year. If after a hearing, the Court finds that there is not a reasonable probability of success, the Court will order such additional relief as it deems necessary and appropriate. . ." The agreement further provides that "[t]he Court may order CPS to develop and present to the Court a plan to achieve the standards."[99]

There is to be a guarantee against segregation of pupils within the desegregated school buildings, and special attention, including additional resources, are to be provided to the "low achieving" schools and "low achieving pupils" wherever they are in the system. The funds to be available for that phase of the program amount to 5 million dollars over the seven year period.

Of considerable significance is the committment made by the State of Ohio to provide 35 million dollars to fund the various programs developed under the plan. The committment of funds by the State provided a major breakthrough during the negotiations. Finally, the state and local defendants agreed to take steps to modify area housing practices so as to minimize future school assignment problems.[100]

In connection with Cincinnati, one of the realities that helped along discussions was the fact that the mythology of "neighborhood schools" and "busing" had been effectively destroyed by virtue of the magnet and alternative programs already in place, for they presently necessitate a considerable amount of pupil transportation. The role played by the trial judge in keeping the parties confronting each other, and dealing with the issues, made the agreement possible.

The Future and Scope of Negotiated Settlements

The climate is much more conducive to settlements today than it was in the past. During the early 1970's when plaintiffs urged school boards to take voluntary steps to desegregate, they were largely rebuffed.[101] Occasionally, school boards would agree, provided the terms were sufficiently anemic to forstall meaningful pupil reassignment. They adhered to a view that "busing" was politically undesirable, or legally impermissible. Plaintiffs were left with no

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99. Bronson v. Bd. of Educ. of the City School Dist. of Cincinnati, 578 F. Supp. 1091 (S.D. Ohio 1984).

100. *Id.*

101. *See* Milliken v. Bradley, 484 F.2d 215 (6th Cir. 1973), *rev'd* 418 U.S. 717; Oliver v. School Dist. of Kalamazoo, 448 F.2d 635 (6th Cir. 1971).

Table 2

STATE DESEGREGATION LITIGATION COSTS*

Fiscal Year	Dayton	Columbus	Case Cleveland	Cincinnati	Youngstown	Total
1972	$ 4,800.00	—	—	—	—	$ 4,800.00
1973	9,600.00	—	—	—	—	9,600.00
1974	4,088.79	—	5,339.29	—	—	9,428.08
1975	—	2,079.59	19,725.44	16,105.15	6,839.86	44,750.04
1976	19,775.00	46,523.50	55,647.75	3,056.34	12,174.55	137,177.14
1977	9,141.75	27,465.72	59,266.06	8,729.89	44,800.00	149,403.42
1978	5,668.50	45,498.01	98,634.41	4,600.80	20,118.92	174,520.64
1979	—	730.63	28,836.22	10,493.29	—	40,060.14
Totals	53,074.04	122,297.45	267,449.17	42,985.47	83,933.33	$569,739.46

*Includes attorney fees, transcripts and court costs.

choice but to sue. Even in instances where liability was found, school officials endeavored to "strike a deal" with groups of plaintiffs that would exclude significant shifts of pupils. On more than one occasion when this was attempted, civil rights groups intervened or sought to intervene on behalf of other members of the class.[102]

Within the Black community there is a strong degree of skepticism and suspicion about having any one but a federal judge dispose of school desegregation cases. Interestingly enough, after the Cincinnati Board of Education and the State Board of Education approved the settlement "unanimously," members of the minority community began to scrutinize closely the settlement's fine print in anticipation of the April 6th fairness hearing. The experience that minorities have had with school boards, even those on whom blacks serve, has not been reassuring. For instance, at the time of the Cleveland desegregation suit, there were three black members on the Cleveland school board one of whom was its President. Yet, the position they took on the issue of segregation and desegregation was hardly distinguishable from those of the white members. In the Cincinnati case the same situation exists with three blacks on the seven member board of education. At the time of negotiations, as was true in Cleveland, a black also served as President. In the latter instance, only one of the three was perceived in the black community as having a strong pro desegregation stance.

School boards, on the other hand, with or without minority members, have been skittish about settlement if it appears that anything more than voluntary, magnet kinds of programs are likely to evolve. Boards continue to be absolutely resistant on the question of mandatory reassignments. If that has to be an element, they prefer to go to trial and have the judge order it. The illogic and hypocrisy of their position flows from the fact that the systems they are managing already "bus" students all over the area. This they do while contending that all students are being afforded a quality education in the segregated context. It is ironic, however, that when desegregation comes and white pupils are reassigned into the schools attended predominately by blacks or hispanics, huge sums of money are made available to upgrade them. If this hypocrisy remains, the skepticism of minorities about the willingness of school systems to act positively toward eliminating racial segregation and against the inferior education to which their children are exposed, will continue.

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102. Calhoun v. Cook, 487 F.2d 680, 682-83 (5th Cir. 1973).

VI. Conclusion

It is now thirty years since *Brown* became the law of the land. That is a period barely over one half the judicially-blessed, separate-but-equal life of *Plessy*. If allowance is made for the years of delay and obstructionism, and for the fact that *Brown* did not move north in a meaningful way until the 1970's, the period during which the nation seriously addressed *Brown* has been not much more than a fifteen to twenty year period. Certainly, considering the history prior to *Plessy*, *Brown* is entitled to a period of implementation at least as long as the 58 years that *Plessy* enjoyed before its efficacy is judged. It should be clear to any rational observer at this point that *Brown* has already transformed the face and heart of America. Honest assessments of school desegregation lead to the conclusion that the desegregation process has had positive effects for all children, black and white.[103] During the past thirty year period, the spirit of *Brown* has had to endure violent resistence, strategies of avoidance and delay, confused and uncertain court decisions, severe attacks on those remedies ultimately fashioned that were proving effective, uneven governmental enforcement policies, the ambivalence and schizophrenia in legislative enactments, and numerous other hurdles. In spite of the foregong, school desegregation has moved forward and the judicial precedents are holding fast. The settlements negotiated in the San Francisco, Nashville, St. Louis, and Cincinnati cases are indicative of a greater willingness to acknowledge settled legal principles.

The danger remains, however, that the cost of bringing suits by private parties and the abdication by the federal government of its committment to vigorously enforce civil rights laws may bring about a climate that will encourage dangerous recidivism.[104] In fact, such a condition could further prod opponents of school desegregation to initiate and press for court decisions and governmental policies that

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103. Willis D. Hawly, *Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies* (1981). In this study conducted by Dr. Willis D. Hawly, Dean of George Peabody College for Teachers, Vanderbilt University, for the Office of Civil Rights and the National Institute of Education, it was found that white achievement has not been harmed, racial isolation has been reduced despite some white flight from areas of desegregated schools and changes have been made in school curricula. The report was based on analysis of more than 1000 studies, 10 court cases, 170 interviews with experts and the desegregation strategies of 16 school districts.

See also Crain & Mahard, *How Desegregation Orders May Improve Minority Academic Achievement*, 16 Harv. C.R.-C.L.L. Rev. 693 (1982).

104. Charles Babcock, Washington Post, quoting former Attorney General Benjamin R. Civiletti, Sept. 1981 in *Without Justice, A Report on the Conduct of the Justice Department in Civil Rights*, 1981-82, by The Leadership Conference on Civil Rights, Feb. 1982.

will further burden the victims of racial and ethnic discrimination. Such a shift would relieve school officials of the affirmative duty spelled out in *Brown II* and *Green* and their progeny to come forward with a plan that promises realistically to work, and promises realistically to work now.[105]

When faced with an opportunity to strike a meaningful blow against de jure segregation, the Supreme Court committed what many judges, educators and others characterize as a retreat from reality with its 5-4 decision in *Milliken v. Bradley*. Shortly thereafter, when the United States Court of Appeals for the Sixth Circuit had to deal with the hard results of that decision on remand, Judge George C. Edwards felt compelled to note with some asperity:

> I join my colleagues in the drafting and issuance of today's order because any final decision of the United States Supreme Court is the law of the land. But conscience compels me to record how deeply I disagree with the decision which we are enforcing. In *Milliken v. Bradley*, (citation omitted), the Supreme Court ovverruled this court and the United States District Court in Detroit by reversing a carefully documented finding of fact that racial desegregation in the schools of Detroit could not be accomplished within the boundaries of the Detroit school district where the school population was found to be approximately 64% black, with a predicted 72% black school population by 1975-76 and 80.7% by 1980-81. The decision also imbued school district boundaries in Northern states (which like Michigan, had never had school segregation laws) with a constitutional significance which neither federal nor state law had ever accorded them.[106]

Fortunately, that setback did not bring to a halt all desegregation efforts. Cases involving single districts were carried forward, though, it seems to be agreed that remedies in many of them could have been more meaningful if they had extended beyond the local boundaries. This can still be done provided the *Milliken*-decreed criteria are first satisfied. Even so, the rationale behind metropolitan solutions are as valid now as they were before *Milliken*.

Judge Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit declared at the Harvard Law

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105. Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968).
106. Bradley v. Milliken I, 519 F.2d 679 (6th Cir. 1975).

School, on the occasion of the 20th anniversary of *Brown* and just before the Supreme Court handed down *Milliken*, with respect to interdistrict relief, that if the Court were to hold such relief impermissible "the national trend toward residential, political and economic apartheid [has] not only [been] greatly accelerated, it has been rendered legitimate and irreversible by force of law." While the Court did not absolutely bar such a remedy, it did raise the ante so as to make it extremely difficult to apply it in any but the most exceptional cases. In dissenting in *Milliken*, Justice William O. Douglas, echoed Judge Wright's earlier prediction: "When we rule against the metropolitan area remedy we take a step that will likely put the problems of Blacks and our society back to the period that antidated the separate-but-equal regime of *Plessy v. Ferguson*."[107]

In this connection, Justice Marshall's warning in the dissent he authored in *Milliken* is surely prophetic: "In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divied up into two cities - one white, the other black - but it is a course, I predict, our people will ultimately regret."[108]

Economic and fiscal realities may compel state officials to do what the Supreme Court declined to do: face the problems of segregation and the needless redundancy and duplication of services and programs in the urban areas of the nation. A common sense approach calls for the bridging of the plethora of school district lines which are more administrative than political. As plaintiffs argued in their *Milliken* brief:

> The school districts and their boundaries were shown to be administrative conveniences. The State has not hesitated regularly to cross or alter these lines in countless instances for a variety of educational purposes. The State has been careful to preserve its ultimate authority vis-a-vis the local districts. . . . In Michigan, local school districts are creations of the State designed to assist in administrating the State's system of public schooling.[109]

It is doubtful that any state or local school official can realistically accept Justice Stewart's view in *Milliken v. Bradley* that the causes of urban segregation are "unknown or unknowable." But even those naive enough to adhere to such a view are enlightened enough

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107. Milliken v. Bradley, 418 U.S. 717, 759 (1974).
108. *Id.* at 814-15.
109. Milliken v. Bradley, Brief of Plaintiffs, Supreme Court, 1974.

to realize that school problems are not more susceptible to solutions within limited political or administrative boundaries than are the problems of water and air pollution, transportation, or law enforcement, all of which are now being approached on a regional basis. If solutions to education problems are considered on an interdistrict or regional basis, *Brown* and its progeny require that they be addressed in a way that ensures a reduction in the degree of segregation now existing and a maximizing of the opportunities for integration.

Professor Drew Days of the Yale Law School, who served so effectively as Assistant Attorney General for Civil Rights in the Carter Administration, wrote a thoughtful article in *Daedulus*, the Journal of the American Academy of Arts and Sciences. He discussed the limits of litigation in the civil rights arena and "raised candidly" the limits of litigation in resolving civil rights problems. He questioned "whether we can continue to look to the litigation model as the principal method for achieving civil rights progress given its significant shortcomings and wavering public acceptance."[110]

Professor Days raises a legitimate question in light of the rocky road over which this nation has passed in its attempt to implement *Brown*. Current attempts to implement remedies, as noted at the beginning of this paper, suffer from the misperception as to what the efforts are all about. Unless the historical bases are understood, individuals will persist in their resistance, and support for remedies will continue to waver. Charles Hamilton Houston's conviction that in matters of race, and constitutional rights, there is an efficacy in litigation, continues to be valid. His protege, Justice Marshall, appears to have understood all this when he offered this bit of insight:

> Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside. [B]ut just as the inconvenience of some cannot be allowed to stand in the way of the rights of other, so public opposition, no matter how strident, cannot be permitted to divert this court from [the] enforcement of constitutional principles at issue. . . .[111]

It remains the task, then, of leaders and molders of opinions, to provide the perspective needed to reinvolve all Americans in the pro

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110. D. Days, *Seeking a New Civil Rights Concensus*, DAEDALUS (Fall 1983) 197, 21

111. Milliken v. Bradley, 418 U.S. 717, 814 (1974).

cess of correcting a historic wrong. At the thirty year mark, there is a long way to go.

Two Hundred Years, An Issue: Ideology in the Nomination and Confirmation Process of Justices to the Supreme Court of the United States

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September, 1987

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INTRODUCTION

Ideology and ideological differences have consistently been at the core of the unfolding historical process of the American experience. It was over ideology that the American colonists broke from British rule. It was ideology that brought the Founding Fathers to Philadelphia in 1787 to form a "more perfect union." The structure of the new American government was based upon fundamental ideological questions concerning the nature of government, who shall govern and how the people shall be governed. Who shall make, execute, and interpret the laws of this land were and continue to be ideological considerations. It was ideology that created political factions and political parties in this nation; and, indeed, it was over ideology relative to slavery and the locus of sovereignty that the nation was torn asunder in a bloody and brutal Civil War.

Because it is the responsibility of the Supreme Court to expound the Constitution -- the fundamental, organic law of the land -- the ideological leanings of the Justices were and continue to be of foremost importance in the appointment and confirmation process. The Justices of the Supreme Court hold the power through their decisions to determine who and how the people shall be governed. And their decisions can and have affected the course of American history, and America's role in the concert of nations.

As the final arbiter of the American constitutional system, the Court's opinions on the nature and scope of federal and state power, on the functions of the various departments of government,

and on the meaning of the written language of the Constitution have built up a great body of living and growing constitutional law. Supreme Court opinions are universally accepted as the final word on constitutional questions.

Robert McCloskey, in his The American Supreme Court, states that the Supreme Court is a "willful policy-making agency of the American government." It has been guided as much by its "prepossessions" as by the mandates of fundamental law. The Court's decisions reflect judicial views of what "ought to be done"; and these views are unquestionably policy determinations based upon "ideology." The issues that claim the attention of the Court are often those least answerable by "rules of thumb", and fundamental law, consequently, the predilections, the "values", the subjective judgements, the "ideology" of the Justices play a significant part in supplying answers to them.[1]

Imbued with the doctrine of judicial review out of which evolved the doctrine of judicial supremacy, the Justices of the Supreme Court exercise an influence on the destiny of America unequalled by any other branch of government. The social, political, and economic ideologies of the respective Justices have impacted on their decisions; and, therefore, their ideologies have been a major determining factor in whether or not they would be appointed to the Court.

In the appointment process, the President receives suggestions from many sources, particularly from his Attorney General, but he makes the decision. And throughout American history, Presidents have usually concerned themselves with the

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ideology of a nominee. The Senate, too, in its confirmation stage has looked to ideology in its acceptance or rejection of a nominee.

When we say that the Supreme Court has made a decision, we actually mean that the nine justices who compose the Court at a particular point in history have made the decision. Often, in fact, it is a decision made by only five members of the Court, with which the other four disagree. The ideology of one Justice, then, can change the outcome of an issue brought before that body. These Justices are humans -- humans of widely varying abilities, backgrounds, and ideologies. And the Constitution is "their letter of instruction." How the Constitution will be read and interpreted by them will depend upon the ideological "lens" through which they view the document. This latter consideration is therefore fundamental in the appointment and confirmation process.

As history has shown, Justices have not been depersonalized and disembodied of all ordinary prejudices and passions. Indeed, their ideological prejudices and passions have been essential to the nomination/confirmation process. In the rarefied atmosphere of their chambers they have not always arrived at decisions by the exercise of pure legal reason. As Max Lerner has stated, judicial decisions are not always "babies brought by constitutional storks."[2] And this realization that Justices do bring their ideologies with them to the Court has been the subject matter of many a confirmation confrontation.

In the appointment/confirmation process, age, geography, physical and mental fitness, professional credentials, and

recently sex and race have been considered in the naming of candidates for the Court. However, ideology has been and continues to be the overriding consideration. Through the years, it has been possible to discern several broad ideologial issues on which Supreme Court nominees have been accepted or rejected. The labels which have been most commonly used in such analyses are the following:

1. Nationalism versus states' rights. This division was particularly significant during the 19th century.

2. Conservative versus liberal. These are such broad terms that they are often meaningless, but they can be sharpened somewhat if they are applied to economic policy and racial issues.

3. Libertarian versus antilibertarian. Since the First World War the Supreme Court has increasingly been concerned with the application of the Bill of Rights in federal and state cases. Considerable difference of opinion has been evident on the Court and with nominees to the Court with respect to the importance of upholding libertarian claims, which always have to be balanced against other important community goals such as peace and order. On the Roosevelt Court the prolibertarians developed the "preferred position" doctrine as a justification for the emphasis which they placed on safeguarding civil liberties.

4. Activism versus self-restraint. These labels have been widely used to suggest the differences between justices who are more willing to use their judicial powers to "correct" what they personally regard as "injustices" of laws and previous judicial decisions.[3]

Of course, applying such ideological labels to justices and nominees is no real guarantee in explaining what their motivations will be once on the Court, but it is and continues to be an inevitable part of the process of nomination/confirmation, and reveals the underlying reasons for the kinds of opinions and decisions they might render.

WASHINGTON/RUTLEDGE APPOINTMENT, 1795

From the very first administration of George Washington the historical record is replete with controversies evidencing ideological differences over the role of the Supreme Court and who shall sit as brethren of that august body.

Before the Supreme Court convened for its Term in August, 1795, events occurred which powerfully affected its future history. In February of 1793 Great Britain declared war on France. The United States declared its neutrality. But Great Britain seized American vessels and impressed American sailors into the British Navy. While these seizures inflamed American feelings against the British, Americans were equally incensed by the British who were stirring up the Indians in the Northwest -- an area that was obtained by the United States by the Peace Treaty of 1783. Yet few Americans were able to enter the territory because of the hostile Indians who had been encouraged by the British to repel the Americans. Worse still, the British had never removed their troops from American soil. Indeed, in 1794, England was actually beginning to build a new fort in the Ohio country.

War between the United States and Great Britain seemed eminent. Hamilton persuaded President Washington to send a special negotiator to London to prevent open conflict between the two countries. On April 19, 1794, Chief Justice John Jay was named to undertake the mission with instructions to: get the British out of the Northwest, force England to pay for the

American ships that had been seized, urge Britain to accept America's rights as a neutral, and negotiate a new commercial treaty with Britain.

When Jay signed the Treaty of London on November 19, 1794, America succeeded in obtaining only some of her demands. The British agreed to evacuate their forts in the Northwest. A commercial treaty opened additional trade with the British and also granted American merchants the right to trade freely with the British East Indies. The rivers, lakes, and waters of the American continent were also to be open to both countries. The British promised to compensate American shipowners for vessels recently seized in the West Indies. An arbitration commission was to work out the amount American merchants still owed to British merchants in pre-Revolutionary war debts. These gains were all Jay was able to get from England. He had no success in convincing the British to respect American rights as a neutral power on the high seas. He also failed to get the British to give up the infuriating practice of impressment.

Of all the articles of the treaty, the one pertaining to American participation in the British West Indian trade was the most controversial. The terms of the treaty denied American merchants a part in the world trade of such valuable Caribbean produce as molasses, coffee, cocoa, sugar, and cotton.

When news of the terms of Jay's Treaty leaked out, the American people were indignant and humiliated because it secured from the hated former Mother Country so much less than they thought they should have obtained. Americans knicknamed John Jay "Sir John Jay" for what they perceived to be his and the

Federalists obvious pro-British sympathies. Federalist President George Washington observed that a cry went up against the treaty "like that against a mad dog."[4] Jay was burned in effigy by turbulent public gatherings. They stoned Hamilton as he spoke in favor of the treaty. The press seethed with arguments for and against the treaty, mostly against.

Even within Federalist ranks in Washington's cabinet opposition to the treaty was evident. Secretary of State John Randolph secretly worked for its defeat. Washington found this out and dismissed Randolph, Timothy Pickering was appointed in his place.[5]

The South was in the forefront of the vigorous national outcry against the treaty for several reasons. It aided the recovery of pre-Revolutionary War debts by British merchants, and most of the debtors were southern planters. At the same time nowhere did the treaty mention reimbursement for slaves carried off by British soldiers during the Revolution. From Virginia to Georgia public meetings denounced Jay's handiwork. Even the Federalist stronghold of Charleston, South Carolina joined the negative chorus. One Charlestonian recalled that "an armed mob erected" a gallows in front of the Exchange on Broad Street "on which were suspended six effigies, designed to represent the advocates of the treaty --" including John Jay, South Carolinans who had approved the treaty, and "his satanic majesty." Many Charleston merchants along with major Federalists like the Rutledge family were angry about the provisions that sanctioned the activities of British merchants in American ports. With no

money for confiscated slaves and competition from British merchants, the Federalists of South Carolina, John Rutledge included, outwardly manifested their contempt of the Federalist policy.[6] However, after a protracted debate the Senate ratified the treaty on June 24, 1795 by a bare 2/3 majority (20-10).

John Jay returned to the United States and resigned as Chief Justice of the United States to assume the Governorship of New York. Washington appointed John Rutledge to fill the vacant seat on the Court. The Senate was in adjournment at the time of the appointment.

John Rutledge was from South Carolina. His credentials seemed impeccable. He helped to write the South Carolina Constitution of 1776. From 1776-1778 he was president of the South Carolina General Assembly and was Governor of the State from 1779-1782. He was a member of the South Carolina Convention to ratify the United States Constitution, and in 1788 was Associate Justice of the Supreme Court of the United States.

But Rutledge ran into trouble when his views about the Jay Treaty became known and aroused bitter criticism, and opposition to his appointment. The Jay Treaty had been ratified in June of 1795. Support of the Treaty was regarded by Washington's adherents as the touchstone of true Federalism. News came to the Federalists that the new Chief Justice, on July 16th, 1795 had delivered an address violently attacking the Jay Treaty. Reports about his views were published in Federalist papers of the North. A leading partisan Federalist paper in Boston stated that Rutledge had appeared "mounted upon the head of a hogshead,

haranguing a mob assembled to reprobate the treaty and insult the Executive of the Union...insinuating that Mr. Jay and the Senate were fools or knaves, duped by British sophistry or bribed by British gold...prostituting the dearest rights of free men and laying them at the feet of royalty." Other papers said that he had declared "he had rather the President should die...than he should sign that treaty."[7]

Although these quotations were denied by Rutledge's adherents, the Federalists were determined that no man who opposed the treaty should be confirmed in office. Edmund Randolph, the Secretary of the State wrote to President Washington at Mount Vernon, July 29, 1795 that he was receiving daily newspaper accounts of Rutledge's behavior -- that his "puerility and extravagances together with a variety of indecorums and imprudences multiply." Oliver Wolcott and Timothy Pickering wrote that the commission not be issued and that Rutledge had brought the country to near ruin and disgrace. Indeed Wolcott asked Alexander Hamilton to come to Philadelphia and "attend the Supreme Court for a few days." The leading Federalist paper, the Columbian Centinel of Boston, published a long and virulent attact on Rutledge (which was widely republished), stating that he could not pay his debts, assailing his private character as well as his political views.[8]

Meanwhile, amid this storm of protest, Rutledge arrived in Philadelphia, and after taking the oath of office on August 12, 1795, assumed his seat as Chief Justice for the Term then just beginning. The Congress had still not yet convened.

When the Term of the Supreme Court ended, Rutledge left Philadelphia to enter upon his Circuit Court duty; but he was destined not to return to the Supreme Court. The Federalists were determined to punish him for his ideology. Yet, in spite of Federalist protest, Washington overlooked Rutledge's apostacy and let it be known that Rutledge's name would be sent to the Senate when it met. Strong efforts were made by Rutledge's Federalist friends to secure his nomination. But Federalists of the North, however, remained unmoved either by Washington's wishes or by the arguments of Rutledge's friends. Oliver Wolcott wrote that attempts to help "men who avow and act upon principles inconsistent with the presentation of order,...have been and will be ineffectual." "I hope," Wolcott continued, "however disagreeable it may be to imply an error of judgement in the President in appointing Mr. Rutledge, that he will not be confirmed in his office."[9] Moreover, another ground for rejection of the nomination arose. It had become generally known or believed that Rutledge was deranged and had attempted suicide. Referring to this possibility Alexander Hamilton wrote to Rufus King, Senator from New York who had asked advice on the question of confirmation, that "if the charges are true" that Rutledge is "deranged" or has acted improperly, or didn't pay his debts, he would vote against confirmation.[10]

As early as August 4, 1795, Attorney General Bradford had written to Hamilton that Rutledge had displayed symptoms of derangement. But as Charles Warren states, Rutledge's mental condition had nothing to do with it. It was his ideology that made his rejection a certainty by the Senate.[11]

The Senate convened on December 16, 1795. The rejection of Rutledge was accomplished by a vote of 10 to 14 -- as soon as that body convened. His defeat was hailed by Federalists and the Federalist press.

The rejection of Rutledge was an event of great importance in American legal history. But for his Charleston speech he would undoubtedly have been confirmed. As his death did not occur until the year 1800, the Chief Justiceship, if held by him, would have become vacant at a time when it is extremely unlikely that President Adams would have appointed John Marshall as his successor. Thus upon the event of an ideological difference over the Jay Treaty, hinged the future course of American constitutional law.[12]

Upon the failure of his first nomination, Washington offered the position to Patrick Henry but old age led him to decline. Washington then named Judge William Cushing but this did not meet with "enthusiastic approval" from the Federalists. The president decided to go outside the Court and make an appointment from the members of the Bar, his choice falling upon the drafter of the Judiciary Act, Oliver Ellsworth of Connecticut -- a staunch Federalist. The Senate confirmed the appointment of Ellsworth as Chief Justice.[13]

JOHN ADAMS "MIDNIGHT JUDGES," 1801

When the election year of 1796 came around it was generally known that President Washington would not be a candidate for a

third term. He had accepted a second term with the utmost reluctance, and now he was up in age and ailing.

It was certain that the Vice-President, John Adams, would be a candidate for the Presidency. He would have the support of the Federalists and the conservative elements in general. Thomas Jefferson ran against him, representing the Republican forces. Adams won the election and Jefferson became Vice-President. Jefferson was now determined to destroy the Federalists and their ideology. But the Jeffersonians needed a cause; and the Federalists were not slow in providing it.

Clearly anti-French in ideology, the Federalists abrograted the treaty with France, and in 1798 passed the Alien and Sedition Acts designed to choke off agitation and to stifle criticism of the Adams administration. With the passing of the Sedition Act, a "Federalist reign of Terror," to quote Jefferson, descended upon the land.14

Many Americans had been tried and jailed under the acts, and widespread disapproval of Federalist policies including the hated Jay Treaty began to mount during the Adams administration. In response to the acts, the Kentucky and Virginia resolutions of 1798 were adopted, instigated by Jefferson. Underlying the resolutions were an attack on Federal "tyranny" and an espousal of states' rights doctrine. Storm clouds were forming over Federalism; and intra-party strife sealed the fate of the Federalist party in the election of 1800.

The campaign of 1800 was unlike anything ever known in America before. For sheer virulence and bitterness it has hardly been surpassed. The gloves were off. What was at stake here was

the fundamental ideological issue of the nature of the American government, who shall govern, and how the people shall be governed. Indeed, it was this ideological issue that caused the formation of the two parties in the first place. On the Federalist side it was a struggle to preserve property rights, strong central government, and power for the rich and priviledged. On the Jeffersonian side it was a battle "to keep America a democracy, with liberty" and a republican form of government. As Jefferson stated to Adams during the political contest: "this is no personal contest between you and me. Two systems of principles on the subject of government divide our fellow citizens into two parties....[15]

The election results had to be determined in the House of Representatives and on February 17, 1801, Jefferson was elected President of the United States. The Federalist era had ended. Not only had the Federalists lost the executive branch but also the legislative branch of government as well. In the House of Representatives the Democratic Republicans out numbered Federalists 69 to 36, and in the Senate, 18 to 13.

Yet the Judiciary remained a Federalist stronghold. Adams fearing the ruin of the nation, attacks on the propertied classes, and the general "levelling" spirit of the Jeffersonians, sought through the judiciary branch to check the "excesses of democracy." In December of 1800 he wrote to John Jay: "In the future administration of our country, the firmest security we can have against the effects of visionary schemes or fluctuating theories will be in a solid [Federalist] Judiciary."[16]

In December of 1800, Chief Justice Oliver Ellsworth resigned from the Court owing to ill-health. Adams appointed John Marshall to the position January 20, 1801. The still Federalist Senate confirmed him unanimously on January 27, 1801. Just three weeks before Adams was to retire from office, the still Federalist Congress enacted the Circuit Court Act of February 13, 1801, changing the entire Judiciary system of the United States -- four days before Jefferson was elected President by the House. Had this measure been adopted at an earlier period, there might have been strong arguments in its favor, for it brought about reform long recognized as desirable. It relieved the Supreme Court of all Circuit Court duty, reduced the number of Justices to five, and established six new circuit courts with 16 separate judges. The Anti-Federalists viewed this measure with hostility, arguing that it increased federal tribunals and federal officials, and that so great an increase was an infringement upon the rights of states. It was another step toward the consolidated government which was so greatly dreaded by them.17

The chief alarm of the Anti-Federalists, however was over the fact that all of these positions would be filled with Federalists by Adams before he went out of office. They soon found their worst fears fully realized. Within 13 days after the passage of the Act, Adams sent to the Senate a complete list of nominations for the new Judgeships, chosen almost entirely from the Federalist ranks; and by March 2, the Senate had confirmed the last name. The appointment of these Judges, who, from the fact that many of the commissions were filled out on the last day

of Adams' term of office, became derisively known as the "Midnight Judges," naturally caused intense indignation to Jefferson and all his party.

One feature of the statute was regarded by President-elect Jefferson as aimed directly at himself and as an intentional diminution of his powers, namely, the reduction of the number of the Court from six to five, by providing that when the next vacancy occurred it should not be filled. As Judge Cushing, who was an elderly man, and in extremely bad health, might naturally be expected to resign within a short time, the restriction on his replacement by Jefferson was an obvious attempt to keep the Court wholly Federalist.

Moreover, the anti-Federalists were justly alarmed at the attempts at centralization by the Federalists. Since the 1800 Presidential campaign, the Federalist newspapers had been filled with articles demanding the extension of the "protecting powers of the Federal Judiciary." The Columbian Centinel, repeatedly carried articles calling for the "extension of the Federal Courts" as the only means to safeguard the Federal Government.

Regarding this new Act, Jefferson and his party leaders were determined upon its repeal as soon as the new Congress convened. Within ten days after his inauguration Jefferson wrote that the principal Federalists "have retreated into the Judiciary as a stronghold," determined to achieve from "that battery" to beat down and erase all semblances of republicanism.[18]

Jefferson and the new Congress immediately launched an attack on the judiciary. The result was the repeal of the Judiciary Act of 1801. Jefferson also replaced Federalists in

existing judicial positions with his own supporters. In 1802, the Jeffersonians passed their own Judiciary Act which enlarged the number of lower federal courts but created no new positions. In addition, Jefferson pardoned those who had been imprisoned under the hated Alien and Sedition Acts, both of which had expired. Indeed, Jefferson thought of his election to the presidency as "the revolution of 1800 -- as a real revolution in the principles and ideology of government, as that of 1776 was in its form.

While Jefferson attacked the Judiciary, the one Court he could not change was the Supreme Court under Chief Justice John Marshall. The reputation of John Marshall has taken on immense proportions with the later triumph of his principles. More than any other man he saved the future of Federalism. During the critical years of the Jeffersonian and Jacksonian assaults upon the outerworks of nationalism, Marshall held the inner keep of the law, and prepared for the larger victories that came long after he was in his grave. He was one man who would not bend to democratic ideals. He profoundly distrusted the principle of confederation. The imperative need of a sovereign political state to curb the disintegrating forces of America was axiomatic in his thinking. Looking upon all democratic aspirations as calculated to destroy federal sovereignty; and convinced that the principle of equalitarianism was "a bow strung to wield against society," he stoutly upheld the principle of minority rule as the only practical agency of stable and orderly government. Holding such views, it was a matter of high and patriotic duty with Marshall to use his official position to prevent the majority

will from endangering interests which were far more sacred in his eyes than any natural rights propagated in the "hothouse of French philosophy" and espoused by the Jeffersonians.

That John Marshall should have come out of Virginia is the irony of ironies. Quite unrepresentative of the dominant planter group that had gone over to Jefferson, Marshall was bitterly hostile to agrarian interests. He was the leader of a small group of Virginians who followed Washington through the fierce extremes of party conflict. He was the last and ablest representative of that older middle-class Virginia, given to speculation and commercial ventures, that was being superceded by a cavalier Virginia concerned about plantations end slavery. He belonged rather to Boston than to Richmond. He was the "Fisher Ames of the South," embodying every principle of the dogmatic New England Federalists. He held intense prejudices which were fundamentally property prejudices. Profoundly influenced by Hamilton and Robert Morris, he found the Boston group more congenial in temper and outlook. Marshall was a businessman rather than a planter. He was heavily involved in land speculation and held stock in numerous corporations. He was a director in banks and a legal adviser in important cases involving property rights.[19] He was an integral part of the Richmond world where politics and law and speculation engrossed the common attention.

Judged by the standards of the present day, or even by those of 18th Century colonial America, John Marshall had little foundation in the law. Six weeks of attendance at George Wythe's law lectures at William and Mary were supplemented by some

common-placing from Bacon's Abridgement.[20] He was a lawyer who learned the law as he practiced it -- under the pressure of litigation.

The two fixed conceptions which dominated Marshall throughout his career were the sovereignty of the federal state and the sanctity of private property; and these found their justification in the virulence of his hatred of democracy. He and Adams, as did most Federalists believed that the "common man" was not equal to them nor equipped to govern himself. Marshall was utterly contemptuous of popular views. He was a born autocrat. His ideology was Federalist ideology.

In 1800 when Americans rejected Federalist views for the republican views of Jefferson, John Marshall declined to yield. Defeated at the polls, no longer in control of the executive and legislative branches of the government, John Adams -- the outgoing Federalist President -- reintrenched Federalist ideology in the Judiciary branch by appointing John Marshall, Chief Justice of the Supreme Court in 1801. As Chief Justice, John Marshall boldly and effectively wrote into the fundamental law of the land the major tenets of Federalist ideology.

Albert Beveridge, John Marshall's biographer, called Marshall's political decisions "judicial statemenship." That phrase means that Marshall utilized the law for political and ideological ends. It is clear that the Jeffersonian assault on the judiciary wasnot primarily an attack on the courts but upon political judges who used their places to serve partisan ideological ends --[21] ends that were at odds, of course with Jeffersonian ideology.

of boom and bust. It fixed the content, tone, and terms of politics for as long as Jacksonianism counted in America. Business conditions oscillated wildly. The contrast of abundant opportunities and frequent failures created the anxious, dollar-conscious American that de Tocqueville remarked upon.

This divergent situation created a divergent political and ideological pattern. The Federalist party had died, to be reborn again in the Whig party, formed in the 1830's. The kind of people who gathered in its ranks looked to the economic boom with excitement and solid approval. The leaders of the Whig party -- Henry Clay and Daniel Webster urged that the destiny of the country be placed in the hands of the financiers and businessmen who sat at the centers of trade, and that the national governmental work in close partnership with them in chartering banks, building public works, and encouraging development.

But the ideology of the Jacksonian -- who in the 1830's settled on the name Democrats -- was fundamentally different. They were apprehensive about the new economy. Ideological heirs of Thomas Jefferson, they were afraid that much of what they saw was not progress but destructive speculation based on special privilege. They wanted to dismantle the apparatus of governmental aids to business and restore the America - that was. To the Jacksonians, the economy, with the aid of the government had been taken over by greedy men who lived by their wits, and the exploitation of others.

Characteristic of Jacksonian ideology was the fear of the Federalist tradition and its resurgence. The Democratic tradition was to suspect the schemes of economic exploitation on

the part of the rich and the powerful. In the age of Jackson the focus of that suspicion was the Second Bank of the United States (chartered by Congress in 1816 to run for twenty years). With headquarters in Philadelphia and branches throughout the country, the bank held the federal government's funds and was free toinvest them in ways that would direct the growth of the economy as it saw fit. Furthermore, it also had the power to monitor the value of paper money issued by hundreds of state-chartered banks. Therefore, it was a financial institution of great power responsible to no one but itself.

To Democrats in general, and Andrew Jackson in particular, the "Monster Bank" represented aristocratic control in a burgeoning age of democracy and equalitarianism. Jackson vowed to destroy it.[23] Interpreting his re-election in 1832 as a mandate from the people to kill the "Monster Bank," Jackson ordered Secretary of Treasury Louis McLane to remove the government's deposits from the Bank of the United States and place them in state banks. Both McLane and his successor William J. Duane refused to carry cut Jackson's order. After Duane refused, Jackson named Roger Brooke Taney to the office. Taney carried out the order and won Jackson's admiration; but also gained the hatred and contempt of the Whigs whom he would have to confront in three confirmation battles.

Roger B. Taney was the spearhead of Democratic radicalism in Jackson's cabinet. A Maryland lawyer, he had once been a Federalist, but left the party during the War of 1812 and by 1824 as a Jackson leader in Maryland. Taney was a man of unshakable determination, who deeply hated the concentration of power in the

hands of the business community. Indeed, he was the ideological darling of the Jacksonians, being described as "the only efficient man of sound principles in the Cabinet."[24] Thus, when Jackson sent Taney's name to the Senate for confirmation as Secretary of Treasury, the Whigs in the Senate led by Henry Clay successfully defeated the move. Taney was the first cabinet member who had been rejected by the Senate.[25] Nonetheless, it was Jackson's appointment of Roger B. Taney as Secretary of the Treasury and his compliance with the President's ideology and wishes in the manner of the bank deposits that paved the way for Taney's elevation to the Supreme Court Bench.[26]

As in every period of American history, the dominant political ideologies of Jackson's time worked their way into controversies over Supreme Court appointees. When Chief Justice Marshall died in 1835, who his successor would be was looked forward to with great interest by the country.

On December 28, 1835, Jackson sent Roger B. Taney's name to the Senate for Chief Justice. Jackson had earlier in 1835 sent Taney's name as associate justice but the Senate rejected his confirmation.[27] And the Whigs reviewed his nomination as Chief Justice with even more consternation. The Whigs in general, and the adherents of the United States Bank in particular, never forgot or forgave Taney's role in the removal of the bank deposits; and anything that Jackson or Taney did was condemnable. Whig newspapers condemned the appointment. Taney was "unworthy of public confidence, a supple, cringing tool of power" and owed his appointment "to his vindication of the President's pet measure [to kill the bank]."[28]

It was generally conceded that "as a lawyer, so far as regards his judicial abilities and acquirement there could be no objection," even by his opponents. But the issue here again was ideology. For over two months and a half, the Senate struggled with the nomination. The Whig opposition was led by Clay and Webster. Finally on March 15, 1836, Taney was confirmed by a vote of 29 to 15. Calhoun, Clay, Crittenden, Ewing, Southard, White and Webster were among those who voted against Taney. The fight in fact, had been led by Webster and Clay. "There was hardly an opprobrious epithet which, as he told me himself, afterwards, Clay failed to use against the nomination," said Beverdy Johnson.[29] And the Whig press expressed contempt of the new Chief Justice: "The pure ermine of the Supreme Court is sullied by the appointment of the political hack, Roger B. Taney."[30] Another said: "Roger B. Taney of Maryland, has been paid the price for removing the deposits....and today, we see a man elevated to the Chief Justiceship for violating the laws of the land."[31]

The Taney Court's decision in Dred Scott (1857) helped to cause Lincoln's succession in 1860 and contributed to the coming of the Civil War. When Lincoln came to the presidency, Taney was still Chief Justice. A significant program for Lincoln would be to undo the Taney Democratic ideology and stamp Republican ideology upon that august body.

LINCOLN'S SUPREME COURT, 1862-1865

The fateful winter of 1860-61, characterized as it was by

the national plunge over the precipice of dissolution, saw the Supreme Court of the United States, long the victim of inadequate quarters move into spacious and majestic chambers. Brought from its dismal courtroom in the basement of the national Capitol, the Court was to enjoy new physical surroundings at the same time that it was to suffer, along with the rest of the nation, the anguish of civil war. It was this Court that awaited the attention of Abraham Lincoln. Would the Republicans inflict punishment upon the Supreme Court that in 1857 handed down the Dred Scott decision? Lincoln himself, had warned that the Court must be forced to reverse the decision.

The urgency of the problems that faced the new President was unparalleled. The crisis of dissolution raced on with vehemence; the assault upon authority grew in its fierceness. The Supreme Court, itself, presented perplexing difficulties to Lincoln. What would the role of the Court be? How would its members evaluate federal efforts to combat the South? How would the Chief Justice, Roger B. Taney, with views as expounded in the Dred Scott case, influence the thoughts and acts of the Court which was Democratic in majority? Within a short time three vacancies existed within its membership. At any point in American history the selection of three Supreme Court Justices by an incoming administration would be of vast significance, but at this juncture, with combat and trial and untried paths ahead, Lincoln's appointments and the decisions that he would make in relation to the nation's highest tribunal would affect the nature and destiny of the republic.

When Lincoln became President there was a vacancy on the upreme Court that represented unfinished business of the dministration of James Buchanan. Justice Lester V. Daniel, a irginian died in Virginia on May 31, 1860, vacating a seat that as claimed by the Southerners, being one of five held by them at he time.

On March 4, 1861, Lincoln delivered the inaugural address. is audience -- the whole nation -- hung on every word he spoke. or here was the man on whom rested the salvation of the nation. t will be recalled that Lincoln's election grew in part out of he decision of the Supreme Court in the Dred Scott case. In 858, he had denounced the Court vigorously in his contest with tephen A. Douglas in Illinois. It was clear that now he would tate clearly the attitude of the Republicans and his dministration; that it was the Supreme Court who was responsible or the national debacle. And in his address he did indeed ttack the Court for its ideology in dictating governmental olicy. He condemned the Dred Scott decision and the Court for ts role in using the tribunal to achieve political ends.

The month of April, 1861 with the nation in a critical ituation witnessed the Court torn asunder. To the one Supreme ourt vacancy that Lincoln inherited, there were now added two ore vacancies. Death removed Justice John McLean of Ohio; and ustice John A. Campbell of Alabama resigned to join the onfederate cause. The Court now lacked one-third of its normal ersonnel. But the President made no appointments at this time ecause the burning need demonstrated at Fort Sumter was to repare for war.[32]

Ideological leanings of appointees were not the only consideration with which Lincoln had to deal relative to the Court. Broader considerations of strategy had to be taken into account. Appointments to the Court, in the final analysis depended upon a reorganization of the circuit system of the United States, a circuit system that was badly antiquated and one that, on account of the secession of the Southern states, would be vastly modified.

Lincoln, on December 3rd, 1861 in his first annual message, dealt with these issues, declaring that the federal judicial system was in need of alteration. The upshot was that the Congress passed a circuit reorganization bill which Lincoln signed July 15, 1862.

The new law provided no changes in the first three circuits, but it did provide vast alteration for the rest. The First Circuit consisted of Rhode Island, Massachusetts, New Hampshire, and Maine. The Second Circuit consisted of New York, Vermont, and Connecticut. The Third Circuit consisted of Pennsylvania and New Jersey. The new Fourth Circuit consisted of Maryland, Delaware, Virginia, and North Carolina. The new Fifth Circuit embraced South Carolina, Georgia, Alabama, Mississippi, and Florida. The new Sixth Circuit included Louisiana, Texas, Arkansas, Kentucky, and Tennessee. The new Seventh Circuit contained Ohio and Indiana. The new Eighth consisted of Michigan, Wisconsin, and Illinois. And the new Ninth included Missouri, Iowa, Kansas and Minnesota.[33] It was generally understood that it was politics, not need that had dictated the regrouping of the states into circuits. With reorganization

accomplished by the Thirty-Seventh Congress, Lincoln now moved to pack the Court. He was privileged to appoint five men to the United States Supreme Court.

Of great significance to Lincoln was the ideology of appointees to the Court. He demanded that the selectees have "sound views" toward the great political issues of the Civil War. Their views had to be "safe" and "right" relative to the Dred Scott decision, the South, slavery and the nature of the Union. Lincoln did not regard legal training and judicial experience as primary requirements.

On January 21, 1862, Lincoln nominated Noah Haynes Swayne to the Court. Swayne opposed slavery and agreed with Lincoln's policies on the war. In addition, he was prominent as a corporation counsel, and in order to prosecute the war, Lincoln needed the support of "big business." The Senate received his nomination and, finding his ideology "right," it moved swiftly, confirming the appointment on Januray 24, 1862.

Lincoln's second appointee to the Supreme Court was Samuel Freeman Miller. Although he was born in Kentucky in 1816, he moved to Iowa in 1849 because Kentucky retained slavery in its constitution. He was an early Whig turned Republican. Senators from Iowa, United States representatives from Iowa, the Iowa state bar, the state legislature, and the Iowa state Supreme Court support the nomination. In 1861 Miller was a candidate for Governor of Iowa, and at the time of his appointment by Lincoln he was chairman of the Republican district committee at Keokuk, Iowa. On July 16, 1862, Lincoln nominated Miller; and on the same day he was confirmed.

Lincoln's third appointment was David Davis on October 17, 1862. Davis was from Illinois and he had an intimate relationship with Lincoln. He presided over the state court and had a lengthy career in the state judiciary and had worked for Lincoln's presidential bid. He held the same ideology as his close friend, the President. On December 8, 1862, Davis was confirmed by the Senate. The year 1862 saw events that were filled with foreboding for the nation. The conduct of the war, the slavery issue, problems over habeas corpus, and arbitrary arrests and the prize cases plagued Lincoln's administration. Convinced that he could ill-afford any additional problems from a Supreme Court that might render the "wrong" decision on these matters, Lincoln and the Republicans pushed to increase the number of the Court from nine to ten justices. They were convinced that the number "ten" was much more "convenient" than the number "nine." Scarcely had 1862 ended before the move to increase the size of the Supreme Court began. Under the leadership of Representative James F. Wilson in the House and Milton S. Latham of California in the Senate, the movement for a tenth circuit gained momentum.

Lincoln considered the increase ideologically prudent. He wanted to increase the size of the Court in order to strengthen the position of those justices who would "view with favor" those acts that the Administration deemed necessary.[34] A tenth circuit meant a tenth Justice. And a tenth Justice, in addition to the three other Lincoln appointees and other friendly Justices on the bench, would provide an adequate ideological "margin of safety." On March 3rd, 1863, the law was passed. In addition to providing

a tenth Justice, the act provided that California and Nevada make up the tenth Circuit.

To keep the power of the Court "right" was the strongest motivation for adding a tenth Justice to the Court. It should be recalled that Taney was still Chief Justice. And Lincoln feared that the conduct of the war would be sabotaged by judges "who were more deeply devoted to the South," or if the Court were weighted on the side of the "old-line Democratic view of public policy."[35] In this regard, Lincoln appointed Stephen Johnson Field of California on March 6, 1863. He was swiftly confirmed on the 10th of March. Field had been a member of the California legislature and in 1857, was elected to the California Supreme Court. He had also been a Democrat but when the Civil War came he had no sympathy for Southern principles. He was deeply loyal to the Union and opposed slavery. He turned Unionist and played a significant role in keeping California loyal to the Union.

With the death of Chief Justice Taney, October 13, 1864, Lincoln was once again given the opportunity to shape the Supreme Court. On December 6, 1864, he nominated Salmon P. Chase of Ohio to be Chief Justice of the Supreme Court. Chase had a notable political career. He was graduated from Dartmouth, conducted a school for boys, read law, and was admitted to the bar in 1829. His political experience included service as United States Senator from Ohio and as Governor of the state. He sought the Republican nomination for the presidency in 1856 as well as 1860. Chase had also served as Lincoln's Secretary of the Treasury. An avowed anti-slavery advocate, Chase was the overwhelming choice

of the Senate which unanimously confirmed his appointment on the same day he was nominated. His appointment was heraled as the ushering in of a new era in American jurisprudence. That new era demanded "an anti-slavery Chief Justice to meet the great and complicated questions that already cast a lurid gloom of their approach over the future of our jurisprudence. Mr. Chase [was] the man of men to meet them."[36]

GRANT/BRADLEY AND STRONG, 1871

The Civil War required money. The income from war taxation was proving to be insufficient to meet the immediate need of large sums. The first legal tender act was passed in 1862. It provided for the issue of bills of credit -- government notes, later knows as "greenbacks" -- to be used as money, and they were made legal tender by terms of the statute. When the war ended their value had greatly depreciated and the government had planned to retire the money; but popular demand that they be continued made the Congress slow to provide for their retirement in the face of such public opinion.

Chase, as secretary of the treasury had advocated the issue of the notes as a temporary war measure. When the war was over, as Chief Justice of the United States, Chase felt that the court should correct the policy of Congress and the tendency to perpetuate the paper as a part of the circulating medium.[37] As a result of these issues, the Hepburn v. Griswold case arose.[38] In an opinion delivered by the Court, Chief Justice Chase, held the

Legal Tender Acts when retrospectively applied were unconstitutional.

When the decision in Hepburn v. Griswold was handed down, the Court consisted of only seven members. Here an explanation of the number and character of the Justices making the Supreme Court becomes desirable.

The Supreme Court had consisted of six Justices from 1789 to 1807; Congress increased it to seven in 1807,[39] and to nine in 1837.[40] By Act of March 3, 1863,[41] a tenth Justice was added. In the autumn of 1864, Chief Justice Roger Brooke Taney had nine Associate Justices. Taney died October 12, 1864. To succeed Taney, President Lincoln appointed Salmon P. Chase of Ohio who had been Secretary of the Treasury until he resigned that office in June, 1864. Justice Catron died in 1865, reducing the Court to nine. After Johnson became President and his differences with the Congress became acute, that body by Act of July 23, 1866,[42] directed that the membership of the Supreme Court be reduced to seven, as losses should occur -- a move to diminish Johnson's power to appoint. Justice Wayne died in 1867, reducing the Court to eight members, its number on November 27, 1869, when the Court, in conference, voted in Hepburn v. Griswold by five to three, to hold the Legal Tender Acts unconstitutional.

Meantime the Congress on April 10, 1869 again revised the number of Supreme Court Justices, raising the membership to nine justices.[43] On December 15, 1869 Justice Grier resigned effective February 1, 1870. On his last day Grier approved Chase's opinion for unconstitutionality of the Legal Tender Acts of 1862. Grier then departed and thus a seven-man Court on

February 7, 1870, by a vote of four to three, adjudged the Legal Tender Acts unconstitutional.[44]

However, since the business of the country had been adjusted to the use of "greenbacks" a holding that they were no longer payment for debts would create disturbance, and incidentally would enrich creditors beyond all reasonable expectation. Many groups therefore, began to urge the re-argument of the question.

Indeed, the reversal of the Hepburn decision was quite within the range of possibilities. On the date of the announcement of the decision, the Court consisted of seven members, divided four to three. The president was authorized by the recent law to increase the membership to nine. Should the two new members align themselves with the three dissenting justices, a reversal could be brought about. On the very day on which the decision was to be announced, President Grant sent to the Senate nominations of two new Justices. They were William Strong, of Pennsylvania, who as a judge of a Pennsylvania court had upheld the constitutionality of the Legal Tender Acts, and Joseph P. Bradley, of New Jersey, a prominent lawyer who had included the Camden and Amboy Railroad among his clients. He was thought to believe the Legal-Tender Acts constitutional. It was freely asserted at the time that railroad interests wanted the decision reversed to protect the right of corporations to pay their debts in cheap money. It was thought that Bradley's railroad connection might have something to do with his opinion on the constitutional question.[45]

After re-argument of the case, on May 1, 1871, with the new majority sitting, the Supreme Court reversed the decision --

olding that the Legal Tender Acts were constitutional. Of ourse cries went out that "Grant had packed the Court" -- a hrase with undertones of scheming, with a suggestion that Grant ad arranged with Bradley and Strong to trade appointment for otes.[46] Most historians agree that this was not Grant's motive n appointing the two new Justices when he did. But Carl Swisher tates that two weeks before the decision was announced Chief ustice Chase informed the Secretary of the Treasury confiden- ally concerning what was about to happen and "there is no ason for doubting that the President, too, had the informa- on."[47] That having such information, Grant packed the Court r the purpose of obtaining a reversal. His administration had en riddled with scandal and corruption - and this latest isode with the greenbacks, to many, represented Grant's attempt appease East Coast financiers and railroad magnates who had ntributed so heavily to this Republican campaign chest.

CLEVELAND/PECKHAM AND HORNBLOWER, 1893, 1894

President Grover Cleveland had two appointees rejected by Senate. The first Democratic President since Buchanan, he vever faced a Republican Senate. His affiliation with the ty of the old Confederacy caused ideological problems. In t, Cleveland wanted to reintegrate the South fully into ional affairs. When he appointed two men who had been federate officers to his cabinet, old Union officers were aged. There was an even greater uproar when he began to urn Confederate flags to the Southern states as a "symbolic

gesture." Then in 1887, Cleveland riled Civil War veterans when he vetoed the Dependent Pension Bill which would have provided support for disabled veterans. His veto was seen as another act sympathetic to the South. The most dramatic action of Cleveland's first term was taken against the tariff -- the high tariff Cleveland felt was no longer needed. When a tariff bill was introduced, in the Senate the Republicans forced the bill into deadlock with demands for continued high rates setting the stage for the battle in the upcoming election. Republican "protectionists" rallied around Harrison and the Grand Army of the Republic because of Cleveland's veto of the pension bill, rallied for Cleveland's defeat. In New York, Cleveland's old enemy Tammany Hall, worked against his campaign. Harrison was elected for 4 years but in 1892 Cleveland was re-elected largely due to the populist movement which backed his candidacy.

One of the major issues in the campaign of 1892 was the income tax issues as well as the tariff issue. Early in the session of Congress beginning December, 1893, a measure was introduced which became the Tariff Act of 1894. In January, 1894, Benton McMillan, of Tennessee, introduced an income tax bill and secured its adoption as an amendment to the tariff bill. The measure was denounced by Republicans as"socialistic and confiscatory."[48]

In the Senate the fight against the measure was led by Senator David C. Hill of New York who employed constitutional arguments. Hill challenged the power of the federal government to tax the income of state-chartered corporations. "The lawful right and power to tax largely involves the power to destroy, "he

eclared. "Can the general government destroy these agencies or nstrumentalities of the state....?"

Senator Hill offered another constitutional argument. He alled attention to the fact that Congress could not tax land ithout apportionment of the tax among the several states ccording to population. He contended that a tax on rentals from nd was essentially identical with a tax on the land itself, and uld therefore not be constitutional unless apportioned as a rect tax.

Discussion of particular constitutional issues led to plied references to the probable attitude of the members of the preme Court. Said Hill:

> I have hoped that with the Supreme Court as now constituted this income tax will be declared unconstitutional.... The times are changing; the courts are chanying, and I believe that this tax will be declared unconstitutional. At least I hope so.[50]

In spite of these objections, the income tax measure was ssed as a part of the Wilson Tariff Act and was to go into fect January 1, 1895. The masses of the people hailed it as a acea for their ills, while the well-to-do flew to arms to fend themselves against its operation. An equity suit was ckly brought to the Supreme Court to test the constitution- ty of the law. The test case, Pollack v. Farmers' Loan and st Company[51] was to be argued in March of 1895.

Meanwhile, on July 7, 1893, Justice Blatchford died. The ancy led to a long and better struggle between President veland and Senator Hill of New York. Cleveland appointed liam B. Hornblower on September 19, 1893. The Senate rejected

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Hornblower, January 15, 1894, by a vote of 24 to 30. On January 22, 1894, Cleveland appointed Wheeler H. Peckham. The Senate rejected Peckham on February 16, 1894 by a vote of 32 to 41. Three days later after the rejection of Peckham, Cleveland filled the vacancy on February 19, 1894 by appointing Edward Douglas White of Louisiana, who was confirmed the same day. White was 48 year old, had been a judge of the Supreme Court of Louisiana from 1876 to 1879, and Senator of the United States since 1891. In the Pollack case, the Supreme Court held the income tax law unconstitutional.

WILSON/BRANDEIS APPOINTMENT, 1930

Woodrow Wilson's appointment of Louis D. Brandeis to the United States Supreme Court on January 28, 1916, was the occasion of one of the bitterest struggles for senatorial confirmation in the annals of American politics. It raised, if it did not settle, many of the vital questions concerning the powers of the court and the relationship of its members not merely to the legal issues in question but to the burning new problems of American economic and social progress.

Wilson had come to the presidency with settled convictions regarding the place of the Supreme Court in the American system, and the kind of men who should be chosen to exercise the vast power implicit in its decisions. Much of his early academic life had been devoted to an objective study of the historical origins of the Constitution and the organization of the govermental institutions which grew out of it. He had lectured and written

for many years upon these subjects and was recognized as an authority in the field. In his Constitutional Government in the United States, published in 1908, Wilson drew together his ripest thought on the matter.

In this treatise he declared that the courts were "the instruments of the nation's growth." The interpretation of the Constitution in its strict letter would prove "a straightjacket, in a means not of liberty and development, but of mere restriction and embarrassment." Judges must therefore be statesmen with "a large vision of things to come," for it is true that "their power is political."

Wilson contended further that the "atmosphere of opinion cannot be shut out of their court rooms -- but judges must "prove themselves such men as can discriminate between the opinion of the moment and the opinion of the age, between the opinion which springs, a legitimate essence, from the enlightened judgement of men of thought and good conscience, and the opinion of desire of self-interest, of impulse and impatience.[52]

In an inscription which Wilson wrote for a presentation copy of Ray Stannard Baker's Woodrow Wilson, he wrote of the Constitution:

> The Constitution of the United States, like the constitution of every living state, grows and is altered by force of circumstances and change in affairs. The effect of a written constitution is only to render the growth more subtle, more studious, more conservative, more a thing of carefully, almost unconsciously, wrought sequences. Our statesmen must, in the midst of origination, have the spirit of lawyers.[53]

Wilson's first appointment to the Supreme Court Bench was that of James C. McReynolds on August 19, 1914 and he was promptly

confirmed by the Senate, August 29, 1914. But McReynolds soon became a thorough going strict constructionist, a conservative of conservatives, and Wilson later admitted that the appointment had been a great mistake -- one that he would not repeat.

When it became necessary, after the death of Justice Joseph R. Lamar in January, 1916, to appoint a new member of the Court, the President determined to appoint -- a man cut from his ideological cloth -- Louis D. Brandeis.

Brandeis was a boldly constructive liberal in his views, with an unusual grasp of the economic problem that confronted the nation. Of Jewish origin and born in Louisville, Kentucky, Brandeis had a brilliant mind. He graduated from Harvard Law School and had a notable career as a lawyer, with a statesmen-like interest in progressive legislation. He had demanded reforms in the control of transportation and public utilities and had been a consistent enemy of monopoly and "bigness."

Wilson had early been strongly attracted to Brandeis. They were kindred in spirit, and cut from the same ideological cloth. After he became President -- and even before -- Wilson had sought the counsel of Brandeis on trust legislation, currency and labor problems.

Brandeis represented the "statesmanship of adaptation" which as a scholar, Wilson considered necessary to the preservation of the Court. And he hoped by this appointment to add to popular confidence in the Court through the liberalization of its decisions.

Before being named to the Court, Brandeis had devised and

was instrumental in establishing the Massachusetts system of savings bank insurance and pensions for wage earners. He took an active part in opposition to the proposed merger by New York, New Haven and Hartford Railroad of steam railroad transportation, electric trolley roads and steamship lines, east of New York, 1907-1912. He was counsel for shippers in advanced freight rate investigations before the Interstate Commerce Commission. He was counsel for the people in proceedings involving the constitutionality of Oregon and Ilinois, 10-hour laws; Ohio 9-hour law; and Oregon's minimum wage law, 1907-1914. He preserved the Boston Municipal Subways system, and established the Boston sliding-scale gas system, 1905. In 1910 he was chairman of the Arbitration Board, in the New York Garment workers strike and was responsible for establishing the system of Preferential Union Shop under the Protocol, 1910-1914.

Louis Brandeis was not surpassed by any other lawyer in the United States. His argument in Muller v. Oregon (1908), on hours of labor for women was considered a classic.[54] Brandeis had adjusted the constitutional system to the conditions of an increasingly complex industrial civilization. Using an unusual brief, Brandeis went beyond law and introduced, social, economic & physical materials into his argument, of which the Supreme Court took judicial cognizance. This kind of brief will be frequently used in the future and will bear his name -- the "Brandeis Brief." Brandeis was the "people's advocate." But in that regard he earned the contempt and bitter hostility of "privileged interests."[55]

On this aspect of his career -- "of making himself obnoxious to conservative interest" -- Brandeis was quoted as saying in 1915:

> If my wife had social ambitions, or if I wanted to join a club, or if I needed to borrow money at the bank, or if I should run for office they would get me. Fortunately, we don't care for society; I am already a member of the clubs I like, I seem to be able to earn more money than I need, and I shall never seek public office.[56]

Wilson sent Brandeis' name to the Senate, January 28, 1916 after the death of Justice Joseph R. Lamar. When the nomination of Brandeis was announced, a cry of "radicalism" at once went up. A Senate inquiry which began hearings February 9, 1916 lasted for months. Its reports contribute highly interpretive glimpses of the battleground in the American ideological struggle for greater social justice, and the lengths to which opponents would go to stop a liberal court.

The Brandeis prediction, that "they would get me" if he sought public office, proved to have foundation. A flood of propaganda began with a protest from sixty-one prominent persons, many of them leading lawyers and citizens of Boston and vicinity, urging that Brandeis did not have the confidence of the bar or the public and that he was not fit for the position.[57] Critics submitted petitions, letters, and personal testimony to the subcommittee of the Senate Committee on the Judiciary having the nomination in charge. They accused Brandeis of mismanaging the affairs of clients and of damaging the interests of former clients through activities which he claimed to be in the public interest. Fundamentally, the opposition boiled down to the

charge that he was guilty of unprofessional conduct, and that, being an advocate in social causes and a crusader, he lacked judicial temperament.

After the specific accusations of misconduct failed to stand up under examination, the committee received a communication from six former presidents of the American Bar Association, William Howard Taft, Elihu Root, Joseph H. Choate, Simeon E. Baldwin, Francis Rawle, and Moorfield Story, saying that in their opinion Brandeis was "not a fit person to be a member of the Supreme Court of the United States."[58] According to the New York World, this communication was "assumed to set forth with unmistakable clarity the opposition to him among nearly all of the judges on the Supreme Court bench."[59]

Little or no attention was given to Brandeis' legal ability. Roscoe Pound of Harvard Law School did state that "so far as sheer legal ability is concerned, [Brandeis] will rank with the best who have sat upon the bench of the Supreme Court."[60] However, consideration of sheer legal ability had little to do with either support or opposition, or with the confirmation which finally took place. The Brandeis nomination exposes to the core the fundamental consideration of ideology in the nomination/confirmation process.

If justices were selected without looking at ideology, what was all the uproar about. If Supreme Court Justices in deciding cases, exert no discretion, no more will or power than "a dry goods salesman measuring calico or a grocer weighing coffee, why should the appointee's social and economic views be relevant in considering his fitness as a judge? If judges are helpless tools

of constitutional imperatives, what difference does it make who holds the scales or applies the yardstick?

The nomination of Louis Brandeis brought these issues into sharp focus which evidenced fundamental changes that were taking place in America. At the core of these issues was the fundamental consideration of the nature of the union, who shall govern and how the people shall be governed.

These significant changes in American society and the reaction to them were described by Vernon Louis Parrington in his Main Currents in American Thought. Parrington asserts that by the opening decades of the 20th century the destiny of the country lay in the hands of its business men. Capitalism was the master of the country and though for the moment it was content to use the political machinery of democracy it was driving towards an objective that was the negation of democracy. This brought a growing uneasiness amongst the middle class who looked with fear upon the program of the captains of industry. Reformers appeared demanding change -- a growing army of them -- essayists, historians, political scientists, philosophers, "a host of heavy-armed troops that moved forward in a frontal attack on the strongholds of the new plutocracy."61 With such political leaders as La Follette, and Theodore Roosevelt and Woodrow Wilson," beating up the remotest villages for recruits; with such scholars as Thorstein Veblen, Charles A. Beard, and John Dewey; and such lawyers as Louis Brandeis, Frank P. Walsh and Samuel Untermeyer, the movement gathered such momentum and quickened such a ferment as had not been known since the days of the Abolitionist movement. They attacked the political machine,

watered stock, Standard Oil, the making of great fortunes, and the like. The American house needed cleaning -- "bad smells seemed to be everywhere." Evidently some hidden "cesspool was fouling American life, and as the inquisitive plumbers tested the household drains they came upon the source of infection -- not one cesspool but many, under every city hall and beneath every state capital -- dug secretly by politicians in the pay of respectable business men. It was these cesspools that were poisoning the national household, and there would be no health in America till they were filled in and no other dug."[62]

It was Louis Brandeis whose ideology would help rid America of its corrupt politics - and lay the blame on the threshold of business -- "like a bastard on the doorsteps of the father."[63] The nature of the union and the future course of the nation seemed at stake with Brandeis' nomination. Brandeis had to be stopped.

Brandeis' ideological opponents did not allow themselves to be trapped. They did not openly oppose his ideology. Rather, they found him wanting on vague scores of judicial temperament and professional ethics. Nonetheless the nub of the case against him was self-evident. The opposition had come to look upon the Supreme Court as a stronghold protecting its vested rights. But Brandeis believed that the government must keep order not only physically but socially. The law, he maintained, "must protect a man from the things that rob him of his freedom, whether the oppressing force be physical or of a subtler kind."[64] To his opponents, Brandeis' confirmation would make every citizen

insecure and unravel the very fabric of American society. This was the core of the case against him.

Confirmation of Brandeis' appointment was finally voted on June 1, 1916, more than four months after his name was submitted, the Senate dividing closely upon party lines: Newlands (Democrat) voted nay; La Follette, Norris, and Poindexter (Republican) voted yea.[65]

Wilson was to make one more appointment to the Supreme Court, that of John H. Clarke on July 14, 1916. He chose him because of ideology -- for a "liberal and enlightened interpretation" of the law. And about Louis Brandeis, Wilson later wrote:

> Like thousands of other liberals throughout the country, I have been counting on the influence....of Justice Brandeis to restrain the Court in some measure from the extreme reactionary course which it seems inclined to follow.....
>
> The most obvious and immediate danger to which we are exposed is that the courts will more and more outrage the common people's sense of justice and cause a revulsion against judicial authority which may seriously disturb the equilibrium of our institutions, and I see nothing which can save us from this danger if the Supreme Court is to repudiate liberal courses of thought and action.[66]

HOOVER/PARKER APPOINTMENT, 1930

On the afternoon of May 7, 1930, with the galleries filled to capacity and with members of the House of Representatives standing three-deep in the aisles of the chamber, the United States Senate voted 41 to 39 to reject the nomination of Judge John J. Parker of North Carolina to be an Associate Justice of

the Supreme Court of the United States. This was the first time since 1894 that an appointee to the high bench had failed to receive the confirmation of the Senate. It is true that in the cases of Brandeis Stone, Hughes and Black loud protest was registered but only Judge Parker failed to receive the necessary majority for confirmation, and was the first to be rejected in the 20th century.

By the turn of the 20th century it was clear and overwhelming that judges were nominated and confirmed with an emphasis on social and economic attitudes. Because opposition in the Senate developing around these ideological considerations which caused his defeat, a detailed discussion is presented here on the Judge Parker nomination.

When Mr. Justice Sanford died in February, 1930, the usual speculation concerning the President's choice of a successor occured. Justice Sanford was a southern Republican and it was believed that Mr. Hoover would fill the vacancy with a man of similar background and persuasion. Among the prominent names mentioned was that of Judge John J. Parker of the Fourth Circuit Court of Appeals. Parker, a native of North Carolina and resident of Charlotte, had been on the federal bench since 1925. He had written approximately 125 opinions and was considered to have a sound judicial mind. In 1920, prior to his appointment to the fourth circuit bench by President Coolidge, Parker had been the Republican candidate for Governor of North Carolina.

The United States in the 1920's moved through a period of gigantic industrial, commercial and financial development with

but few effective controls upon the national economy -- the philosophy of laissez-faire prevailed in the government. Consequently the vast prosperous, sprawling giant of American economy went its way comparatively unhindered by serious federal or state interference with the processes of business and industrial life. America's business and political leaders were practically unanimous in the belief that no new controls upon the economy were necessary. The constitutional system, in their opinion, wisely and correctly restricted the scope of federal activity and protected private property and free enterprise against unreasonable governmental interference.

Yet the economic storm clouds were forming, but most Americans ignored them. President Herbert Hoover, taking office in March of 1929 confidently predicted the greatest era of material prosperity in the world's history. Even then, however, the clock was ticking out the final moments of laissez-faire prosperity.

In October, 1929 the stock market wavered, broke, then crashed downward, inaugurating the most catastrophic economic collapse in American history. At first the Hoover administration and the nation's business leaders treated the great depression as no more than a "passing flurry."[67]

As the depression continued its downward course, Hoover recognized the need for some relief measures; but his deep-seated faith in a highly individualistic laissez-faire economy made him fundamentally unwilling to counternance a broad governmental program for either relief or social reform. He was committed to the belief that bureaucratic controls of private business were

pernicious, that governmental interference with natural economic law was unwise and unnecessary; and that economic recovery would come about in due course through the inevitable corrective processes inherent in a system of untrammeled free enterprise.

Hoover's constitutional position in the great crisis flowed quite naturally out of his individualistic social philosophy. The federal government, he felt, must be exceedingly careful not to overstep the constitutionally prescribed limits of its power. Constitutional change "must be brought about only by the straight forward methods provided by the Constitution itself." That is, Hoover could not recognize the economic emergency as an adequate reason for the assertion of new federal powers and controls, no matter how badly needed they might be. In short Hoover's faith in laissez-faire economics and constitutional conservatism made it impossible for him to launch a large-scale national attack on the depression.[68] And in a book, American Individualism, Hoover set forth his credo.

With regard to the Negro, in this period, John Hope Franklin, in his From Slavery to Freedom states that the real dissatisfaction with the Republican party began in 1928 when Republicans attempted to resurrect a strong party in the South with white leadership. Prominent Black Republican leaders in the South lost influence in their states as the Republican high command began to recognize white leaders in those states and to seat white delegates at the national convention instead of the Negro delegates who presented themselves. Black leaders and the press supported Alfred E. Smith rather than Herbert Hoover.

Hoover's "southern strategy" was successful. He carried Florida, Kentucky, North Carolina, Tennessee, Texas, Virginia, and West Virginia. It demonstrated the Republicans' possibility of amassing strength among white Southerners, especially when the Democratic candidate was a Roman Catholic, an advocate of the repeal of prohibition, and a reputed friend of the Negro. It also showed the extent to which the Republican party was willing to alienate the Negro vote in an effort to build up a following that could crack the Southern Democratic stronghold. After the election, to add insult to injury, Hoover is reported to have said that he was very much interested in building up a Republican party in the South "such as could commend itself to the citizens of those states." He meant white citizens, of course.[69]

Thus, for Hoover, the appointment of Judge Parker to the Supreme Court was a political and ideological dream come true. Parker was from the South, a proponent of laissez-faire, anti-labor and anti-Black. On March 10, 1930, Hoover sent Parker's name to the Senate believing it would receive routine approval.

A subcommittee of the Senate Judiciary Committee was appointed to study the nomination. Senator Overman, Democrat of North Carolina, was the chairman with Senator Borah, Republican of Idaho, and Senator Herbert, Republican of Rhode Island, constituting the remainder of the group. The American Federation of Labor opposed the Parker nomination. President William Green of the AFL appeared before the committee testifying that Parker was anti-labor. In April, 1927, Judge Parker handed down a decision in the International Organization, United Mine Workers

of America et al v. Red Jacket Consolidated Coal and Coke Co. This decision upheld an injunction issued by a federal district court against the United Mine Workers, preventing further interference by the union in the operations of certain coal mines in West Virginia.[70] Judge Parker upheld the injunction basing his decision on the precedent established in the Hitchman Coal case decided by the Supreme Court in 1917. The United Mine Workers challenged the jurisdiction of the federal courts in the Red Jacket case but Parker ruled against them again, basing his decision on the precedent establishe in the second case of Coronado Coal Co. v. United Mine Workers of America decided in 1925. After Parker's ruling, the Supreme Court refused to hear the case and the decision against the United Mine Workers became final, at least for the time being.

In opposing Parker's confirmation, AFL President Green said:

> The significance is not that Judge Parker followed the precedent of the Hitchman case but that his opinion reflects a judicial attitude entirely in sympathy and accord with the legal and economic policy embodied in the injunction. Confirmation will mean another "injunction" judge will be a member of the Supreme Court.[71]

Green continued his testimony arguing that Parker's position was that it would be unlawful for unions to persuade an employee to join a union.

Walter White Secretary of the National Association for the Advancement of Colored People also testified against Judge Parker. White presented into the Record of the Committee a statement made about Blacks by Parker when he was the candidate for governor of North Carolina in 1920. According to the Greensboro (N.C.) Daily

News of April 19, 1920, Parker had stated before the Republican State Convention:

> The Republican Party of North Carolina has accepted the [literacy test and Grandfather clause] amendment [to the North Carolina Constitution] in the spirit in which it was passed and the Negro [sic] has so accepted it. I have attended every state convention since 1908 and I have never seen a negro [sic] delegate in any convention that I attended. The negro [sic] as a class does not desire to enter politics. The Republican Party of North Carolina does not desire him to do so. We recognize that he has not yet reached the stage in his development where he can share the burden and responsibility of government.... And every intelligent man in North Carolina Knows that it is true.....[72]

Walter White of the NAACP added that his telegram to Parker inquiring of his present views on this subject had gone unanswered, therefore, the NAACP assumed that his attitude had not changed.[73]

White continued that a man who entertained such ideas could not be dispassionate or unprejudiced if such racial matters came before the Court and therefore Parker was unfit to occupy a place on the bench. White further maintained that the race problem had to be settled on the basis of evenhanded justice and that more cases under the 14th and 15th Amendments would be presented to the Court. It would be improper to place such a man as Parker on the Court.[74]

Nonetheless, the report of the subcommittee was 2 to 1 in favor of confirmation. Senator Borah cast the negative vote.

On April 28 the full Senate officially took the question under consideration. Senator Borah led the fight against confirmation. Senator Overman led the fight for confirmation.

The debates lasted from April 28 until May 7, 1930. Sentiment was clearly mounting against the confirmaiton. Hoover had been under pressure to withdraw Parker's name, but he stood firmly behind his nominee. Further arguments against Parker centered around the belief that he lacked talent, training, judicial ability and courage.75

On May 7, the Senate voted 41 to 39 against the confirmation of Judge Parker. The NAACP and organized labor had waged a successful campaign against the nominee. But it was the strategy of the NAACP against Parker that brought the defeat. That strategy bears further elucidation.

The impact of the Plessy decision produced in stark and legal reality, the two worlds of race in America -- one black, one white. Blacks lived in a kind of imperium in imperio. In the larger community, Blacks were "denied education; driven out of the churches; excluded from hotels, theaters and public places; labeled like dogs in traveling; refused decent employment; forced to the lowest wage scale; compelled to pay the highest rent for the poorest homes; prohibited from buying property in decent neighborhoods; ridiculed in the press, on the platform, and on stage, disfranchised; taxed without representation; denied the right to choose their friends or to be chosen by them; deprived by custom and law of protection for their women; robbed of justice in the courts; and lynched with impunity."76

However, it was the epidemic of race riots which swept the country early in the new century that aroused the greatest anxiety and discomfort among the Black population. Rioting in

the North was as vicious and almost as prevalent as in the South. The Northern riot that shook the entire country was the Springfield, Illinois riot of August, 1908.

The Springfield riots shocked the sensibilities of many whites. A meeting was called in 1909 of liberal whites and leaders of the Niagara Movement -- including W.E.B. DuBois -- to discuss "the present evils" of American society. The upshot was the formal organization in May, 1910 of the NAACP. From the very beginning the NAACP adopted the program which has continued to characterize the organization's activities. It laid heavy stress on two means of combating discrimination: legal battles in the courts, and education and persuasion of the nation at large. Some important legal victories were won when the NAACP was still in its infancy. In 1915, the Supreme Court ruled Oklahoma's grandfather clause unconstitutional, and two years later a Louisville ordinance requiring residential segregation was similarly invalidated. During the 1920's the organization's major effort was its attempt to publicize and put an end to lynchings. The anti-lynching campaign was organized by James Weldon Johnson who served as NAACP Executive Secretary during the twenties. Johnson's aggressive leadership helped to swell the NAACP's membership rolls.[77] By 1921 there were more than 400 branches scattered all over the United States, gathering information for the Association and carrying out, on the local front, the aims of the parent organization.

By 1930, the NAACP had made the decision to launch a "large-scale, widespread, dramatic campaign to give the Southern

Negro his constitutional rights, his political and civil equality...and to give the Negroes, equal rights in the public schools, in the voting booths, on railroads and on juries in every state where they are at present denied them."78

Thus, when Hoover in April 1930, sent the name of John J. Parker to the Senate, the sirens went off at the NAACP headquarters in New York. The Carolinas were Klan country and Blacks did not need another advocate of Jim Crowism on the nation's court of last resort. The one Southerner already on the Court -- McReynolds -- had already established himself as an enemy of the interests of Black people. And often McReynolds carried his three ultra-conservative brethren with him -- Van Devanter, Sutherland, and Butler. Add someone from North Carolina to that bloc and the Negro's hope of obtaining relief from the judicial branch of the federal government would be as slender as it was in the other two branches. Naturally Walter White ordered a prompt investigation of Judge John Parker.79 And, when Parker's anti-Black speech of 1920 was actually cut from the North Carolina, Daily News and mailed to White at the NAACP headquarters, Judge Parker's "confirmation was in trouble."

Moreover, when there was no response to White's inquiry to Parker about the 1920 speech, White took his story to the board of directors, which authorized him to fight the Parker nomination. Hoover was asked by the NAAC[illegible] to withdraw the nomination. Hoover angrily rejected the request. White then appeared before the Senate Judiciary subcommittee. Senator Lee S. Overman of North Carolina, chairman of the subcommittee was

incensed -- charging that "niggras vote freely throughout North Carolina." But White was unrelenting. Other Senators were amazed and resentful that a Negro organization would dare speak up to oppose the nomination of a federal judge to the Supreme Court.[80]

However, the NAACP headquarters sent out telegrams to every NAACP branch, with special emphasis on those in the North and in border states where Negro voting was a growing political factor, and urged telegraphic protests to their home-state Senators by the branches and by every church, labor, civic, and fraternal group. Mass meetings were quickly called, and W.E.B. DuBois, in his 20th year as editor of The Crisis, legal-committee head Arthur Spingarn, and White himself hit the speaking circuit.[81]

Of course, the press picked up the controversy. Oswald Garrison Villard, a founder of the NAACP, denounced the Parker nomination in The Nation. The Washington Post and the Scripps-Howard chain joined the opposition. Some of Parker's defenders denied the NAACP charges that he had made the anti-Black speech. White immediately had the Greensboro newspaper clipping photostated and placed on the desk of every Senator and sent to the White House and to every newspaper correspondent of consequence in Washington. Hard-lining racists sent their lobbyists swarming over Capitol Hill asking whether any self-respecting lawmaker from Dixie would accept the dictates of some "nigger advancement society."[82] The vote was going to be close.

Little wonder then, that on May 7, 1930, packed galleries of the Senate followed the seesaw-tally. Senator Thomas Schall,

blind and seriously ill, returned to Washington from his home in Minnesota and entered the chamber to vote against confirmation. The final tabulation showed 39 votes for confirmation, 41 against. Hoover was stunned.

"The first national demonstration of the Negro's power since Reconstruction days," the Christian Science Monitor said of Parker's defeat. The Montgomery, Alabama, Advertiser, credited the NAACP with destroying Parker's nomination: "He had other effective opposition but it was this organization that broke his back."[83] What had begun as a routine matter had turned into a donnybrook. Obviously what the politicians and pundits had failed to discern was the political regeneration that was taking place among Blacks. More and more Blacks were using their votes to register their protests. They studied the voting records of members of Congress and watched carefully the utterances and policies of the Presidents in order to bloc or ferret out[84] those whom they considered their enemies. A new boy was on the "political block" -- a new element in the "political mix" -- the Negro, and the organization that spoke to his interest -- the NAACP.

F.D.R. AND THE "COURT PACKING SCHEME," 1937

The hope for a dynamic, masterly executive, focused on Franklin D. Roosevelt who millions of Americans wanted desperately to believe was that brave new leader with a magic touch to transform the "toad of depression into a dazzling prince of prosperity." Winning the Democratic nomination in 1932,

Roosevelt in his acceptance speech promised a "new deal for the American people." Roosevelts victory in the presidential election of 1932 was a landslide, winning 472 electoral votes to the Republican Hoover's 59.

Urging "bold experimentation" for a devastated land, Roosevelt attracted newcomers to Washington armed with ambition to improve American society and life; the "brain trust" sought to improve the economy's organization; social workers came with plans to aid the unemployed, the disabled, and the aged. Together they composed the "New Dealers" -- a term of affection to some but anathema for the more conservative Americans. The latter group charged that the administration was socialistic or communistic. The sheer quantity of government activities in 1933-1934 had led many to believe that the county was abandoning its free enterprise system for a state controlled economy.

Two measures formed the heart of the early New Deal. One was the National Industrial Recovery Act of June, 1933 which represented a continuation of government-sponsored business cooperation. Its most important provisons authorized each specialized segment of business to prepare a code of self-governance, and established the National Recovery Administration to supervise the process. Section 7a of the Act authorized workers to organize and bargain in their own behalf and provided the labor movement with important benefits: it fostered a national pattern of maximum hours and minimum wages, and it eliminated child labor and the sweatshop. The second basic law was the Agricultural Adjustment Act of May 1933. It made provisions for marketing agreements, commodity loans, expor

subsidies, government purchase of agricultural products and even currency inflation. It also provided for production restrictions, aimed at reducing Agricultural surpluses at their source. Farmers were paid to plow under their crops and slaughter their livestock. Each farmer was expected to reduce production of his crops by a nationally fixed percentage. The goal of the new law was to increase farm income to a level of "parity" or equality with the farmer's purchasing power.

The New Deal experimented with a variety of measures to overcome the depression and permanently improve living conditions for the mass of Americans -- regulation of finances, public relief programs, the Tennessee Valley Authority, and relief and old age insurance.

But what gave hope at the bottom of society spread horror at the top. Among many people with a strong stake in the existing system -- bankers, lawyers, corporation executives, the new laws represented images of a chaotic society in which the masses would be pitted against the privileged classes. The primary political test of the New Deal's methods came in the election of 1936. The margin of victory would serve as a critical index to the New Deal's success and the ideological direction into which Roosevelt was taking the nation. Roosevelt won by a landslide over the Republican opponent, Alfred Landon. In the Congress huge Democratic majorities were evident in both houses.

Roosevelt read his victory in 1936 as a mandate to storm the conservative outpost -- the Supreme Court. In an earlier campaign speech in 1932 he recognized "the Republican party was in complete control of all branches of the government -- the

Executive, the Senate, the House of Representatives, and I might add for good measure, the Supreme Court as well."[85] The reference to the Republicanism of the Supreme Court had to do with the identification of a majority of the Court with a conservative philosophy of government which the Republican party professed. The conservative ideology of four of the Justices, Van Devanter, McReynolds, Sutherland and Butler, and the diligence with which they guarded rights of property against the extension of governmental control were well established. Chief Justice Hughes and Justice Roberts seemed to occupy something of a middle road. And Justices Brandeis, Stone, and Cardozo could be classified as liberals. As presently constituted then, the antagonism of four justices toward the New Deal program was to be assumed, the alignment of two others was highly uncertain, and only three offered any prospect of enthusiasm for the program.

Roosevelts' concerns were well-founded. In 1935 in the Schechter case, the Supreme Court struck down the NRA; and, in 1936 in United States v. Butler the Court invalidated the tax on food processing in the AAA. These decisions forced a confrontation between Roosevelt and the Supreme Court. Roosevelt felt that the New Deal could not work with the "horse and buggy" mindset held by the Court.

Roosevelt and his Attorney General Homer Cummings concluded that the Court had to be dealt with, either by the retirement of judges, or the superseding of such justices. Since under the Constitution the justices served during good behavior, there was no way to compel them to retire merely on grounds of age. The device hit upon then, was to assume that justices over 70 years

of age were incompetent and out of touch with the problems of the nation. Roosevelt therefore provided for the appointment of an additional justice for each justice who had served for 10 years and had not resigned or retired within six months after reaching the age of 70. What this meant in effect was that the President was requesting the right to enlarge the Court form 9 to a maximun of 15 members if those justices over 70 years of age did not voluntarily resign. Thus, if the aged justices did not retire, their conservative votes would be out-numbered by majorities including the votes of the new appointees.[88] If, as Chief Justice Charles Evans Hughes stated, the Constitution was what the Court made it, Roosevelt would remake the Court. The President submitted the plan for judicial reform to Congres on Feoruary 5, 1937.

The Senate rejected Roosevelt's plan for the following reasons:

1. that it applies force to the judiciary and undermines the independence of the courts.

2. it violates all precedents in the history of our government.

3. that the theory of the bill is in direct violation of the spirit of the Constitution and its employment would permit alteration of the Constitution without the people's consent or approval.

4. it tends to expand political control over the judiciary department by adding to the powers of the legislative and executive departments respecting the judiciary.[87]

After 168 days of exhausting, bitter battle, Roosevelt's court plan was defeated with a scathing indictment of the Presidents real intentions:

> The bill...is in violation of the organic law. No amount of sophistry can cover up this fact. The effect is to provide forced retirement, or failing in this, to take from the Justices affected a free exercise of their independent judgement..... Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and a different interpretation and one which may not sound so pleasant to our ears....This bill is an invasion of judicial power such as has never before been attempted in this country.[88]

Yet, the Supreme Court did gradually fall in line with the generally accepted New Deal ideology in a number of significant cases.[89] And the new trend in constitutional interpretation was to become even more obvious with the changes in personnel which took place in the ensuing years.

Indeed, the epoch-making shift in constitutional law which the Supreme Court made at the 1936-1937 term marked the end of an old era and the beginning of a new one. It evidenced one of the few sharp transitions in American judicial history. During the four years beginning 1937, seven members left the Court and successors were appointed, and in the process of change, Justice Stone was promoted to the Chief Justiceship. Only Justice Roberts remained without the stamp of New Deal approval at the time of the death of President Roosevelt in the spring of 1945, and he retired the following summer. He was replaced by a Truman appointee, as was Chief Justice Stone after his death in 1946. In short, the old Court disappeared completely. The Roosevelt appointments were Hugo Black of Alabama, Stanley Reed of Kentucky, Felix Frankfurter, William O. Douglas who succeeded Brandeis, Frank Murphy of Michigan, James F. Byrnes of South Carolina, Robert H. Jackson of New York, and Wiley B. Rutledge.

Roosevelt's nomination of Hugo L. Black caused great opposition. He had been United States Senator from Alabama, and his ideology was consistent with the New Deal program. But based upon evidence published in the press, Black was accused of being a member of the Ku Klux Klan. In an unusual step of delivering an explanation address over the radio, Black admitted that he had been a member of the Klan. He insisted that his membership had expired and that he had none of the prejudices as to race and creed which such membership implied. The attempt to challenge Black failed. Indeed, even before the challenge, the Senate followed tradition and had confirmed the appointment "of one of its own members without holding hearing on it."90

EISENHOWER/WARREN APPOINTMENT, 1953

President Eisenhower's appointment of Earl Warren as Chief Justice of the Supreme Court in 1953 was the classic example of ideological "mistaken identity." Chief Justice Fred M. Vinson, a Truman appointee, died September 8, 1953. It was a fateful judicial event. Since Civil Rights was the central domestic issue of the Eisenhower administration, the outcome of the pending Brown litigation was of critical moment to Americans. Vinson was viewed by many as the chief obstacle to the Court's prospect of reaching a humanitarian and judicially defensible settlement of the monumental segregation cases. In view of Vinson's passing just before the Brown reargument, Justice Frankfurter remarked, "this is the first indication I have ever had that there is a God."91

Eisenhower was not actively committed to civil rights; and there was widespread opposition of Blacks to Eisenhower's bid for the presidency -- they remembered his stand favoring Army segregation as late as 1948. Eisenhower desired the new Chief Justice to have a "moderately progressive social philosophy" -- a middle-of-the-roader. He chose Earl Warren. Warren belonged to the moderate wing of the Republican Party and had been Thomas E. Dewey's running mate in 1948. Before that he was Governor of California. Considered level-headed and devoid of extremism, even in spite of the role he played in the uprooting and relocation of Japanese-Americans from their homes and their land. Eisenhower liked Warren, whom he had first met at the 1952 Republican National Convention. On a number of important "policy" questions, his ideas meshed with Eisenhower's support of state jurisdiction over offshore oil lands, for example, and full approval of the Court's vote to strike down Truman's seizure of the steel mills. It was a fact too, that the Warren-led California delegation had voted to seat the pro-Eisenhower delegates at the 1952 Republican convention -- a move that practically sealed the Eisenhower victory.[92] In September, 1953, Eisenhower nominated Warren to the Court.

Black America -- and indeed President Eisenhower -- contemplating what impact the coming of Earl Warren as Chief Justice might have on the ultimate decision in the segregation cases, might have found a clue on the front page of the nation's largest Black newspaper the previous year -- the Pittsburgh Courier. The Courier interviews were run in the spring of 1952 in which the leading Republican presidential nominees were asked

about civil rights. Indeed, presidential hopeful Eisenhower was interviewed. Eisenhower "voiced complete ignorance of the subject except to express his firm belief in states' rights," the Courier reported. When asked what he thought about the tremendous cost to education as a result of the dual systems of education, Eisenhower responded, "I did not know that there was an additional cost involved." When asked about putting a Negro in his cabinet, Eisenhower responded, that he had not thought about that.

When the Courier interviewed Earl Warren, the article quoted him as declaring:

> I am for a sweeping civil rights program, beginning with a fair employment practice act.... I insist upon one law for all men.[93]

Warren further warned that the nation must not fear the word "welfare," and that "we must not shrink from the known needs of social progress." Further, Warren had advocated anti-lynching and anti-poll-tax legislation.

Perhaps, Eisenhower did not read the Black press, because Warren's unanimous decision in Brown was the bane of Eisenhower's existence. It was Warren's first major opinion as Chief Justice. If he had delivered no other opinion but this one, he would have won his place in American history. On May 17, 1954 a unanimous Court held "that in the field of public education the 'doctrine of separate but equal' has no place. Separate educational facilities are inherently unequal."

However, the Court ordered still further argument the next term on problems of implementing its decision. Simon E. Sobeloff, who had now become Solicitor General, submitted in a

brief for the Federal Government suggesting -- as the Justice Department had earlier indicated -- that the cases be remanded to the trial courts to work out local problems. President Eisenhower personally inserted a passage in the brief. Where it said that the Court had "outlawed a social institution which has existed for a long time in many areas throughout the country," he added:

> ...an institution, it may be noted, which during its existence not only has had the sanction of decisions of this Court but has been fervently supported by great numbers of people as justifiable on legal and moral grounds. The Court's holding in the present cases that segregation is a denial of constitutional rights involved an express recognition of the importance of psychological and emotional factors; the impact of segregation upon children, the Court found, can so affect their entire lives as to preclude their full enjoyment of constitutional rights. In similar fashion, psychological and emotional factors are involved -- and must be met with understanding and good will -- in the alterations that must now take place in order to bring about compliance with the Court's decision.[94]

This sentiment reflected the hands-off-the-South attitude that President Eisenhower had exhibited throughout his White House tenure. Eisenhower disagreed with the decision, the Warren Court and he held Warren, himself in personal contempt. In naming Warren to the Court, Eisenhower lamented that it was the "biggest damn fool mistake I ever made in my life" -- an ideological mistake!

Chief Justice Earl Warren's memoirs portray disappointment close to bitterness at President Eisenhower's lack of support for the Brown decision. If the President had but thrown his office behind Brown, Warren explained, "we would have been relieved.... of many of the racial problems which have continued to plague us."

Instead, said Warren, Eisenhower "resented" the Brown decision and once told him that southerners after all "are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes."[95]

LYNDON JOHNSON/THURGOOD MARSHALL, 1967

It has been justly stated that the Brown decision strongly accelerated a public interest in the Constitution, particularly the Bill of Rights; and that Chief Justice Earl Warren performed a leadership role as "constitutional educator."[96] If this is so, it was Thurgood Marshall who wrote and presented the "lesson plan." For his struggle in expanding the meaning of the Constitution, President Lyndon Johnson nominated him as Justice of the Supreme Court on June 13, 1967. He was named to fill the vacancy of the retiring Justice, Tom Clark. It was, in fact, the son of Justice Clark, Attorney General, Ramsey Clark, who submitted Marshall's name to the President.

Marshall and Johnson were ideological "soul-mates" on civil rights and many of the programs of the Great Society. Of course, to the "ideological right," Marshall was the symbol of the social upheaval taking place in the county -- it was the "judicial activism" of the Warren Court and Marshall in particular that Southerners believed to be at the core of the problems. Thus, when the Senate confirmed the Marshall appointment on August 31, 1967, it was not without opposition from the South. The vote was 69 to 11. The overwhelming Senate approval came after almost 81

hours of speeches in which Marshall was criticized as being "too liberal" and unqualified for the post.

All but one of the "nay" votes were cast by Senators from the Deep South. The "non-Southerner" who opposed the nomination was Robert C. Byrd, a West Virginia Democrat.[97]

Most of the opposition to the nomination charged Marshall with "judicial activism;" that he would line up with other activists in criminal law, civil rights, and antisubversive cases. Senator Sam Erwin, a former Supreme Court Justice of North Carolina who was considered the leading legal theorist of the "Dixie" forces, led off with a one hour and twenty minute speech on the "judicial activist" theme:

> Judge Marshall is by practice and philosophy a constitutional iconoclast and his elevation to the Supreme Court at this juncture in our history would make it virtually certain that for years to come, if not forever, the American people will be ruled by the arbitrary notions of Supreme Court Justices rather than by the precepts of the Constitution.[98]

Indeed, Senator Erwin attacked the Court continuously after 1954. He declared that the Court had usurped powers that belonged to Congress and to the states; and he warned that if the justices were permitted to continue on their reckless course, the Constitution would be reduced to "a worthless scrap of paper, the American system will perish, and the states and their citizens will become helpless subjects of judicial oligarchy."[99] The Senate confirmation of Marshall, nonetheless, prevailed.

LYNDON JOHNSON/ABE FORTAS NOMINATION, 1968

President Johnson was not as fortunate with his appointment

of Justice Abe Fortas to the Chief Justiceship in 1968. The "off-year" election in November of 1966 had produced some surprising gains for the Republicans. They added three new Senators and 47 House members. They were unable to control either house of Congress, but they could link arms with conservative Democrats to slow down Johnson's Great Society legislation. Much of the Republican upsurge was due to the deepening discontent with "Johnson's Vietnam War," with crime and with urban unrest. The 90th Congress was, therefore, harder for Johnson to convince. A sharp slap came in 1968 when the Senate voiced bitter opposition to the elevation of Justice Abe Fortas to the Chief Justiceship. Indeed, the entire Court was still under continuous fire.

Fortas was born in Memphis, Tennessee. He graduated from Yale Law School. From 1933 to 1937, he was an assistant professor of law at Yale. He held many government posts. In 1942 he was named Under Secretary of the Interior. He entered private law practice in Washington in 1947. He became known as an outstanding appeals lawyer and a defender of civil rights. In 1965, Johnson appointed him associate justice of the Supreme Court. Their personal friendship could be traced back to the early New Deal days. In fact Johnson saw his Great Society as the logical extension of New Deal ideology--so did Abe Fortas.

Chief Justice Earl Warren resigned his post in a letter to the President dated June 13, 1968. In a news conference on June 26th, Johnson named Justice Abe Fortas to be elevated to the Chief Justiceship, and Judge Homer Thornberry of the Fifth

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Circuit, from Austin, Texas, to take Fortas' seat as associate justice.

During the summer months of 1968, Justice Fortas testified before the Senate Judiciary Committee. Opposition to Fortas' appointment centered around charges that as a justice of the Supreme Court he attended meetings with the President on the riots and on the Viet Nam war--issues that he might have to address on the Court. Fortas testified that he had assisted the President on strategy planning conferences on the Vietnam war and urban riots.[100] Fortas was further charged with attempts to get a job for Bill Moyers, and a Federal judgeship for attorney David G. Bress. Fortas replied that he was "rather certain" he had not done this. When asked about a report that he had written the message given by President Johnson ordering Federal troops into riot-torn Detroit, Fortas responded that he did see the message but "did not write it."[101]

Crucial discussions of Fortas' interpretation of the Constitution were raised by Senator Sam Ervin--particularly Fortas' point of view about recent Supreme Court decisions.

In the next days' questioning, July 18th, the question of Justice Fortas' "extra-legal activities on behalf of President Johnson" dominated the proceedings. Fortas acknowledged that in a phone call, he rebuked a business leader because he publicly criticized President Johnson's Vietnam war policy.[102]

Senator Strom Thurmond opposed Fortas' views on voting rights requirements. In grueling questions about constitutional limitations, states rights, the role of the Supreme Court, it was becoming increasingly clear that Fortas' nomination was in

trouble. Justice Fortas went to the President to ask that his name be withdrawn. On October 2, 1968, President Johnson withdrew Abe Fortas' name from consideration as Chief Justice. But, again, Justice Fortas became the subject matter of a controversy over his misconduct as a Justice, in receiving money from the Wolfson Foundation. Fortas was forced to resign May 16, 1969. Nixon, now President, accepted the resignation.

What was fundamentally at stake here was larger than Fortas, the man. It was the issue of ideology relative to the role of the Supreme Court, and its decisions on civil rights, and personal liberties guaranteed by the First Amendment. As a result of several decisions of the Warren Court, America as many knew it (and wanted it to remain), was changing radically. Certainly Blacks were pushing for more gains. To many Americans, this meant the end of America, the Constitution, and Democracy. With Warren retired, the "right" replacement could "restrain" the "activism" of the Warren Court. President Johnson had already succeeded in appointing Thurgood Marshall. That was bad enough. Now Johnson had nominated as Chief Justice a man whose ideology and position on civil rights and liberties was clearly demonstrated; and a third appointee, Thornberry, was probably of the same stripe. Instead of ending the "infamous" Warren Court, these appointments portended even greater "evils" for those who sought to stem by "judicial restraint," the "excesses of democracy" for which they held the Supreme Court responsible. Fortas had to be stopped. And indeed, Johnson had to be voted out of office.

NIXON/HAYNSWORTH AND CARSWELL, 1969, 1970

The tumultuous events of 1968 that led many to fear for the very future of the nation provided Richard Nixon with a unique opportunity. The assassinations of Dr. Martin Luther King, Jr. and Robert Kennedy, the protest movements of Eugene McCarthy and George Wallace, the violence and bloodshed that overtook the Democratic convention in Chicago--all contributed to one of the most remarkable political comebacks in American history--Richard Nixon and the Republican Party.[103]

No one in 1964 had even the vaguest idea of what might happen to the Republican party four years later. There was, at the top of the Republican Party, effectively, nothing--leadership would belong to whoever snatched it in the next three years. No formal description whatsoever can fit the condition of the Republican party at this time. Both great American parties were coalitions of such broad and fluid nature as to be subject to no labels of description whatsoever. One might try however. Fundamentally, the Republican party is white middle-class and Protestant. Here and there across the nation, various other ethnic groups are absorbed into this parent mass--as are Italians, and Irish middle-class citizens in the Northeast, German and Scandinavian Americans in the Midwest. Two moods color its thinking. One is the old Protestant-Puritan ethic of the small towns of America, of the decent, sober, god-fearing, law-abiding men whom Nixon in 1968 was to call "the forgotten Americans." The other is the philosophy of private enterprise, the sense that the individual, as man or corporation, can build swifter and

better for common good than big government. From middle-class America the Republicans get their votes; from the executive leadership and from the families of the great enterprises they get their funds.[104] Theodore White states eloquently that ideologically, historically and regionally, these larger patterns, are however, so split that only metaphor can serve to describe the interlocked and contending parts; and it is best, therefore to compare the Republican structure to a mobile. The Republican Party hangs suspended from the roof beam of American history, with branches, forks, and clusters of dangling groups all of different sizes, shapes colors and weights, constantly seeking a center, an internal balance, as it sways in the breezes of politics or shudders in the great gusts of history.

In 1965, and for the next three years, the gusts of history that swept through America were to stir and shake every value that middle class America had cherished for centuries. Riots, bloodshed and disorder were to characterize every major American city, war in Asia was to shake the traditional discipline of patriotism, most of all among the college children that middle class America had bred. The vast and visionary expansion of Johnson's Great Society, coupled with the cost of war in Asia were to unleash a slow then steadier inflation that eroded the values of thrift and shivered the planning of all who worked on fixed-income salaries or looked forward to pensions. Most of all, manners and morals seemed unbound by the sweeping permissiveness of a Supreme Court which, apparently found Bible-reading in schools illegal, but pornography permissible in or out of class. America was approaching a time when the clash

of its two great cultures, the old and the new, was to burst into the political arena to fill the air with an entirely new rhetoric.

The gusts and storm winds were to shake the Democratic Party to a climax of unprecedented turbulence and violence by mid-summer of 1968. But as they began to blow in 1965, all the clusters in the Republican mobile began to sway and bob in response also, seeking their center balance.

It was not until the end of 1966 that anyone could discern among the swaying parts of the Republican Party any systematic approach to the re-conquest of power nationally and the seizure of leadership internally.[105]

It is said that not until after the off-year elections between Presidential campaigns are all the cards dealt to the players in the quadrenniel Presidential contest. In November, 1966, therefore, with all the off-year election returns in, with all the Governors, Senators, and new Congressmen in place, serious political men began to survey the scene and found among Republicans the first stirrings of ambition.[106]

Those Republican stirrings of ambition were rewarded with the election of Richard Nixon in 1968. Robert Divine in a chapter entitled "Nixon and the Politics of Division," in his Since 1945, asserts that Nixon had exploited the divisions within America. The theme of his campaign was white against Black, South against North, conservative against liberal. In fact Divine asserts, Nixon's political need was to transform the resentments and grievances of the 1960's into a solid Republican majority in 1972.[107]

To maintain his appeal in the South--his "Southern Strategy"--in the 1968 campaign, Nixon had ducked the school issue, giving vague approval for a "freedom-of-choice" plan favored by his southern supporters. Yet after he took office, he discovered that the issue had suddenly reached a climax, with school districts across the South facing a September 1969 cutoff of federal funds. Worried conservatives, led by South Carolina's Strom Thurmond, who had played a key role in Nixon's nomination and election, bombarded the White House for relief. In August, 1969, the federal government requested a three-month postponement in the court-ordered desegregation of 33 Mississippi school districts--to shore up Southern support for him in 1972.

Nixon pursued the "Southern Strategy" even more openly with his Supreme Court appointments. Indeed, his court appointments were to be the judicial component of his "Southern Strategy." This first opportunity to alter the "ideology" of the Court came with Earl Warren's resignation as Chief Justice. Warren had offered to resign in 1968, but had stayed on when Johnson's choice of Justice Abe Fortas for the Chief Justiceship failed. Fulfilling a campaign pledge to appoint "strict constructionists" who would reverse the liberal trend of the Warren Court on civil liberties, Nixon chose Warren Burger, a conservative federal judge, as Chief Justice, a nomination that met with quick Senate approval. In the summer of 1969, a sudden vacancy developed when Justice Fortas resigned. Nixon followed Attorney General Mitchell's advice and nominated Clement F. Haynsworth, Jr., a federal judge from South Carolina. Haynsworth possessed a conservative judicial philosophy, and a consistently

segregationist record as an appeals judge. With Haynsworth, Nixon could satisfy his southern supporters (and many anti-Blacks elsewhere) and thus carry forward his southern strategy for 1972.[108]

Nixon's judicial appointments were also quite deliberately a part of his drive to make "government less meddlesome and less intrusive."[109] For Nixon the Warren Court had come to symbolize judicial activism--"the unwholesome intrusion by the federal courts into areas of policy choice traditionally the province of the legislative and executive branches, and states and localities." Nixon was a firm believer in the principle of "judicial restraint": that it was the Court's role to construe the Constitution and interpret the laws, not to make social policy; that its function was to decide whether a legislative enactment was constitutionally permissable "not whether it was good or bad."[110]

Throughout the 1968 campaign Nixon stressed his belief that the courts, and especially the Supreme Court had gone too far in the direction of "free-wheeling" judicial activism; that they were "usurping the prerogatives of Congress, and "infringing the prerogatives of the executive;" that he would use his power of judicial appointment to sway them "back toward the traditional mold of judicial restraint--of strict construction of the Constitution."[111] Nixon had also stressed his belief that the South had been "discriminated against too long, "and that a century after the Civil War, it was time to begin treating the South once again as a "full-fledged part of the Union."

When Nixon became President, the Court had only one member

from the South: Hugo L. Black of Alabama, who with William O. Douglas, had long held down "the liberal end of the judicial spectrum." Nixon reasoned that the conservative South deserved representation by at least one conservative southerner on the Court. The Justice Department served up the name of Clement Haynsworth of Greenville, South Carolina, Chief Judge of the Fourth Circuit Court of Appeals, legal scholar, "grower of prize winning camelias," pillar of the community and the bar. On August 18th, 1969, Nixon submitted his name to the Senate.112

The appointment ran into trouble from the start. Democrats who were still smarting from the Abe Fortas affair, nailed Haynsworth relative to his own "conflict of interest." Haynsworth had purchased 1,000 shares of Brunswick Corporation stock late in 1967 after he had voted in favor of Brunswick in a case, but before the decision had been announced.113 Judge Haynsworth had stated that he "simply did not recall the pending decision," when he purchased the stock.

Haynsworth's opponents in the Senate made it clear that they would make his sense of propriety the major issue in the confirmation battle.114 Haynsworth opponents further charged that he acted improperly in 1963 when he took part in a case involving the Textile Workers Union's charge against Deering Milliken & Co., which had contracts with the Carolina Vend-a-Matic Company, in which he (Haynsworth) owned a 1/7th interest. Judge Haynsworth cast the swing vote in the 3 to 2 decision against the union. In 1963, the year of the decision, Haynsworth received fees from Vend-a-Matic for attending luncheon meetings of its board of directors.115 Opposition to Haynsworth on

ethical matters was led by Senator Birch Bayh, Democrat of Indiana. Haynsworth's response was that he saw no impropriety in his actions.

From the beginning labor opposed the nomination of Haynsworth. George Meany sent a telegram to Nixon opposing his selection and promising to work to kill the confirmation, because of his decisions in labor cases--Haynsworth was anti-labor. Roy Wilkins, Executive Director of the NAACP assailed the nomination. Other statements of opposition came from the Urban League, Americans for Democratic Action, and the Leadership Conference on Civil Rights.

Roy Wilkins of the NAACP charged: "that Judge Haynsworth, while sitting on the United States Court of Appeals voted for racial segregation." Wilkins maintained:

> There would be no more unobtrusive yet deadly way of negating completely the legislative victories won through the hardest effort by the nation's minority of black citizens...then for a President to nominate for the nation's highest court a judge who has already voted for racial segregation policy outlawed and made illegal by the Congress.[116]

Senators Strom Thurmond, John Tower, Paul J. Fannin, James B. Allen and Ernest P. Hollings however, were enthusiastic about the appointment.

By October, it became necessary however for the President in a press conference to defend his nomination of Haynsworth and to defend the conflict of interest charges:

> I have examined the charges. I find Judge Haynsworth an honest man. I think he will be a great credit to the Supreme Court, and I am going to stand by him until he is confirmed.[117]

On Haynsworth's ideology, Nixon explained that it is like his:

> If Judge Haynsworth's philosophy leans to the conservative side,...that recommends him to me...
>
> It is the judge's responsibility and the Supreme Court's responsibility, to interpret the law, and not to go beyond that in putting his own socio-economic philosophy into decisions in a way that goes beyond the law, beyond the Constitution.[118]

However, the Senate was not impressed. And although his judicial superiors had cleared him of formal charges of impropriety, the Democrats, led by Indiana's Birch Bayh succeeded in convincing many liberal and moderate Republicans not to confirm the appointment. On November 21, 1969, the Senate voted 55 to 45 to reject Haynsworth. For the first time since 1930, a president had been rebuffed on a Supreme Court nomination.[119]

However, Ray Price asserts that the real case against Haynsworth was that he was a southern conservative and anti-Black. The intensive and effective pressure by the NAACP and the AFL-CIO, and the Leadership Conference had brought the Senate rejection of Haynsworth.[120]

Nixon, angrier than his aides had ever seen him, and determined not to take the defeat lying down, told Mitchell to find another southerner, another sittng judge, a strict constructionist, and a Republican. The Attorney General came up with the name of G. Harrold Carswell, a federal appeals judge from Florida. Not only was Carswell "mediocre," he was also a racist. On his mediocre qualifications, Senator Ernest Hollings who had voted for confirmation admitted that Carswell "was not qualified to carry Judge Haynsworth's law books."[121] Professor William Van Alstyne of the Duke Law School characterized Carswell's record as demonstrating "a lack of reasoning, care or

judicial sensitivity." Louis H. Pollack, Dean of the Yale Law School testified that Carswell "presents more slender credentials" than any other nominee for the Supreme Court in this century![122] Twenty two Law School Deans opposed Carswell; and thirty one law professors from universities all over the country were against the nomination.[123] It was impossible for Senate members to dismiss the overwhelming vote of no confidence in Judge Carswell from the legal teaching profession.

On his racial views, it was clear that Carswell was a racist. His speeches and his rulings on desegregation manifested this. His dedication to "strict constructionism" meant in effect:

> the South[ern] opposition to the Supreme Court desegregation rulings and its use seems certain to encourage those who still think it is possible to shout. Never.[124]

Disclosures of past advocacy of racial segregation and the ground swell against him by the legal community doomed the nomination. On April 8, 1970, the Senate rejected Carswell, 51-45; thirteen Republican Senators voted "nay."

The double Supreme Court defeat embittered Nixon. He tended to agree with Mitchell's comment, "if we'd put up one of the twelve Apostles it would have been the same," and he shared the Attorney General's belief that in losing on the appointments, he had won the undying loyalty of the South. In a speech, an angry Nixon strode into the press room, glowered at the T.V. cameras, and declared:

> I have reluctantly concluded that it is not possible to get confirmation for a judge on the Supreme Court of any man who believes in the strict construction of the Constitution, as I do, if he happens to come from the South. Judge Carswell, and before him, Judge Haynsworth have been submitted [sic] to vicious assaults on their honesty, and on their character. They have been falsely charged with being racists.

> But when you strip away the hypocrisy, the real reason for their rejection was their legal philosophy that I share, of strict construction of the Constitution, and also the accident of their birth, the fact that they were born in the South.[125]

Obviously what the President failed to grasp was that ideology was the basis of his nominations; and ideology was the basis of the Senate's rejection.

Nixon, angry, was forced to turn north for his next nominee. Within a week he named Minnesota's Harry A. Blackmun, who for eleven years had been judge of the U.S. Circuit Court of Appeals for the 8th Circuit. This time Nixon met personally with Blackmun before announcing his selection. The following year, with two vacancies to fill simultaneously--replacing Associate Justice Hugo L. Black and John Marshall Harlan--he abandoned his criterion that the nominee must be a sitting Federal judge. To one of the vacancies he named William H. Rehnquist, a brilliant young assistant attorney general. For the other he chose Lewis M. Powell, Jr. a Richmond attorney and former president of the American Bar Association. Both were "exceptionally well qualified," both were "judicial conservatives"--and in Powell he at last had his conservative justice from the South!

The most emotionally charged continuing domestic issue of the Nixon years was school desegregation in general and busing in particular. Nixon was antibusing. He bitterly resented court decrees which he felt went beyond the legitimate authority of the courts in "fashioning wholly new requirements not only that officially sanctioned segregation be abolished, but also that racial balance be enforced." In his view, the courts that did this were not protecting constitutional rights but infringing

constitutional rights, in a display of "judicial activism verging on judicial tyranny."[126]

Under Chief Justice Warren's leadership the Supreme Court spearheaded a "revolution." It fell to Nixon and indeed to President Reagan to attempt the undoing of the Warren Court's "revolutionary" decisions. Descriptive labels began to be used in great abundance, dependent upon the acceptance or rejection of those momentous decisions and their impact--"judicial activism," "judicial restraint," "preferred freedoms," "separate but equal" and "penumbra." All these phrases are well known except "penumbra." In 1965, Connecticut's anticontraceptive statute, though violative of no express provisions of the Constitution, foundered on the "penumbral" right of privacy. "Specific guarantees of the Bill of Rights," Justice Douglas reasoned for a majority of seven (mentioning Amendments 1, 3, 4, 5, 6, 8, 9, 14), "have penumbras, formed by emanations from those guarantees that give them life and substances."

"We do not sit," the justice observed, "as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."[128] For Justice Douglas the Court safeguarded the penumbral right of privacy. Justice Black dissented, accusing the Court of "amending the Constitution, under the guise of interpreting it, thus, turning the Court into "a day-to-day Constitutional Convention." Sounding the note of "strict

construction," Justice Black declared war on penumbral embellishments.[129]

Webster defines penumbra as a "marginal region or borderland of partial obscurity or some blighting influence as of doubt...." Professor Alpheus Mason asserts that, that idea is not unprecedented--Chief Justice Fuller's (1895) "direct and indirect effects;" "liberty of contract," "separate but equal," are all penumbras. The latest penumbra Professor Mason states, is "executive privilege."[130]

Less esoteric are the terms "preferred freedoms" and "judicial activism." "Preferred freedoms" first appeared in a Supreme Court opinion of 1940, Jones v. Opelika to describe constitutional values entitled to special judicial scrutiny. Thereafter it was used to identify priority accorded speech, press, religion, and sometimes other Bill of Rights freedoms. Another caption of recent vintage is "judicial activism." Some would suggest that this began with the Warren Court. The fact is that all Courts have been activist in one way or another.[131] John Marshall was an activist, Roger Brooke Taney was an activist. The Courts headed by Chase, Field, Fuller, Taft Hughes and Stone were activist Courts.

After 1937 the role of the Court changed from formally and actively defending property to actively defending the "human values of free thought, free utterance, and fair play."[132]

Judicial activism reached its high point under the Warren Court and became a political issue when that court actively gave support to civil rights (the new preferred freedom). "The fat was in the fire." An all out attempt was and is being made to halt

the impact of that Warren Court's activism, with the appointment of "strict constructionists." The three major pillars of the Warren Court's constitutional edifice--race relations, reapportionment, and rules of criminal procedure were to be challenged.[133] And more recently the penumbral rights to privacy might be added--including the right to abortion--as being under fire. Indeed the issue is whether these last mentioned are rights at all. At the core of these great and complex considerations is ideology.

REAGAN/BORK NOMINATION, 1987

And now, two hundred years and numerous ideological controversies later, the nation stands poised, once again, for what portends to be a controversial ideological struggle over a Supreme Court appointee.

On July 1, 1987, President Reagan nominated Robert H. Bork, to be an Associate Justice of the Supreme Court of the United States--to replace Justice Lewis F. Powell, Jr. Bork's nomination was instantly controversial because the man Judge Bork would replace has been the swing vote in many 5-4 decisions.[134]

Bork was born March 1, 1927 in Pittsburgh, Pennsylvania. He received in 1948 a B.A. degree from the University of Chicago and in 1953 a J.D. degree from the University of Chicago Law School. He was admitted to the Illinois Bar in 1954. His military service includes several years in the Marine Corps. From 1962-1973 he was a law professor at Yale Law School. From 1973-1977, Bork was Solicitor General of the United States.

1982 he was appointed United States Circuit Judge, District of Columbia Circuit--a position he now holds. He is married, with three children, and a Protestant. His many professional activities include, Resident Scholar of the American Enterprise Institute, Washington D.C., 1977; Adjunct Scholar, 1977-1982; Presidential Task Force on Antitrust, 1968; Consultant, Cabinet Committee on Education, 1972. He is the author of many scholarly articles, and a book, The Antitrust Paradox: A Policy at War With Itself. (1978)

It is generally believed that the Senate will not cast a more important or far-reaching vote than this one concerning the Bork nomination. It has been stated that the decision of the Senate will profoundly influence the law of the land well into the 21st Century. Indeed, Bork's confirmation might drastically alter the balance of the Court and fundamentally influence the civil rights and civil liberties achievements of the past 30 years. Thus, laws regarding voting rights, reproductive rights, affirmative action, privacy, "one-man-one vote, women's rights, church-state issues, First Amendment issues, and school desegregation could be substantially affected by his confirmation. The Bork nomination "is the most historic moment of the Reagan Presidency."135 An examination of Judge Bork's judicial record and ideology is essential.

In the category of race discrimination, Judge Bork found insupportable the Court's 1948 decision in Shelley v. Kraemer, (334 U.S.1), holding that judicial enforcement of racially restrictive covenants violates the 14th Amendment.136 He disapproved passage of the provisions of the 1964 Civil Rights Act

barring discrimination in public accomodations (though in his confirmation hearings in 1973, he said he had changed his mind.)[137] In a letter quoted in the 1973 Solicitor General hearing he wrote:

> The proposed legislation, which would coerce one man to associate with another on the ground that his personal preferences are not respectable, represents such an extraordinary incursion into individual freedom, and opens up so many possibilities of governmental coercion on similar principles, that it ought to fall within the area where the law is regarded as improper.[138]

While Bork recanted this view at the hearing, it is significant that at a pivotal time in history when basic constitutional protections were about to be given the force of law, Bork was outspoken in his opposition to such progress. In an article on the constitutionality of the President's busing proposals published by the American Enterprise Institute in 1972, Bork thought the Supreme Court was wrong in upholding provisions of the 1965 voting rights act banning the use of literacy tests under certain circumstances. (Katzenbach v. Morgan, 1966). He has made clear his opposition to affirmative action remedies for employment discrimination. Moreover, in the Senate hearings on the confirmation of Bork in 1973, he asserted that the equal protection clause of the 14th Amendment was an improper ground for the Supreme Court's invalidation of West Virginia's poll tax law. When questioned further by Senator Tunney about whether the Harper v. Virginia Board of Elections (1966) case had been correctly decided in its impact upon the welfare of the nation, Bork replied:

> ...It was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the nation one way or the other.[137]

Bork's views apparently stem from his narrow interpretation of the equal protection clause, which he referred to in a 1971 Indiana Law Journal article as the "Equal Gratification" clause. Bork wrote that the clause required "formal procedural equality" and that "government not distinguish along racial lines. But much more than that cannot properly be read into the clause." Thus, Bork would not apply the equal protection clause to women or other minorities.140

Apart from his opposition to the Court invaliding poll taxes and barring literacy tests for voting, Bork has expressed opposition to the Supreme Court's decisions establishing the rule of "one man-one vote," established in Baker v. Carr (1966), and Reynolds v. Sims (1964). He could find no basis for these decisions in the 14th Amendment.141

On issues of individual rights, Judge Bork has asserted that there is no constitutional underpinning for the right to privacy. "I am convinced... that Roe v. Wade [the decision striking down certain state abortion laws] is, itself, an unconstitutional decision....142 In a unanimous decision written by Bork in the Dronenburg v. Zech, he upheld the Navy's discharge of James Dronenburg for engaging in homosexual conduct. Homosexual conduct Bork asserted did not come within the zone of constitutionally protected privacy.

With regard to First Amendment rights, Judge Bork maintains that the First Amendment protects only "explicitly and predominantly political" speech, that is, speech intended to influence government policy or activity. Even political speech, he asserts, should be unprotected if it advocates overthrow of

the government or any other violation of law, a contention that might extend to civil disobedience. He also objects to Supreme Court decisions requiring a "clear and present danger" before such speech may be forbidden.[143]

Judge Bork is widely credited as being a proponent of judicial restraint, a judicial philosophy that in administrative law cases requires courts to defer to the executive branch. Judge Bork's decisions suggest that he generally adhered to this philosophy only in cases brought by individuals or organizations other than a business (non-business cases). However, Judge Bork did not consistently adhere to the principles of judicial restraint. When a private corporation or business group sued the government, Judge Bork voted for business.[144] In cases of business interests, a consumer, or environmental groups against the government, Bork voted to uphold the business interest, and voted against environmental or consumer interests.[145]

Of great interest to the American public and particularly to some members of the Senate is Bork's participation in the "Saturday Night Massacre." The issue raises questions about his judgment and willingness to carry out blindly a directive of the President. In 1973, as acting Attorney General, Bork participated in the "Saturday Night Massacre," firing Watergate Special Prosecutor, Archibald Cox. Attorney General Elliott Richardson resigned rather than fire Cox and Deputy Attorney General William Ruckleshaus was discharged for failing to fire Cox. Bork's action seemed to violate the Department of Justice charter establishing the special prosecutor, under which Cox could be removed only for "extraordinary impropriety." Indeed his action

was later found to have been illegal by Judge Gesell of the federal district court[146] -- though this decision was vacated later.

Judge Bork's action raises serious questions about the extent to which he, as a justice on the nation's highest court, would require the federal government to adhere to constitutional and other legal limitations. This point is particularly crucial in light of the recent Iran-Contra scandal.

Because of Judge Bork's long and varied academic and judicial experience, he has left a voluminous record on many issues that touch the every day lives of Americans. His ideology could affect the course of social and economic history in America. The ideological stakes, therefore, are high.

Finally, the philosophy of Justice Felix Frankfurter reveals the fundamental considerations that must accompany the appointment of Supreme Court Justices. Prior "judicial service" should not be an indispensible qualification--Marshall, Story, Taney, Curtis, Campbell, Miller, Bradley, Hughes, Brandeis and Warren had none. Mastery of "federal specialities" is not indispensable; and "geographic considerations" are irrelevant, as are political affiliations. Only by disregard of all these irrelevancies in the appointment of Justices will the Court adequately meet its august responsibilities. The necessary attribute is "greatness in the law."

Greatness in the law is not a standardized quality, nor are the elements that combine to attain it. Greatness may manifest itself through the power of penetrating analysis exerted by a trenchant mind; it may be due to persistence in a point of view

forcefully expressed over a long judicial stretch; it may derive from a coherent judicial philosophy, expressed with pungency and brilliance, reinforced by the Zeitgeist, which in good part was itself a reflection of that philosophy; it may be achieved by the resourceful deployment of vast experience and an originating mind; it may result from the influence of a singularly endearing personality in the service of sweet reason; it may come through the kind of vigor that exerts moral authority over others.

The Supreme Court is a very special kind of court and political affiliation, judicial service or specialities have no specifc relations to the kinds of litigation that come before the Supreme Court, to the types of issues they raise, to qualities that these actualities require for wise decision.

Justice Frankfurter asserts that the Court was from the beginning the interpreter of the Constitution and thereby, for all practical purposes, the adjuster of governmental powers in our complicated federal system. It is essentially accurate to say that the Court's preoccupation today is with the application of rather fundamental aspirations and what Judge Lerned Hand calls "moods," embodied in provisions like the due process clauses, which were designed not to be "precise and positive directions for rules of actions." The judicial process in applying them involves a judgement on the process of government. The Court sits in judgement, that is, on the views of the direct representatives of the people "in meeting the needs of society," on the views of Presidents and Governors, and by their construction of the will of legislatures that Court breathes "life," feeble or strong, into the inert pages of the Constitution and the statute books.

Such functions surely call for "capacious minds and reliable powers" for fair-minded judgement. It demands the habit of curbing any tendency to reach results agreeable to desire or to embrace the solution of a problem before exhausting its comprehensive analysis. The task of the Court is to seize the permanent, more or less, from the feelings and fluctuations of the transient. Therefore it demands the kind of equipment that Doctor Johnson rather grandiloquently called "genius," namely "a mind of large general powers accidentally determined to some particular direction as against a "particular designation of mind" and propensity for some essential employment.

For those wielding ultimate power it is easy to be either willful or wooden; willful, in the sense of enforcing individual views instead of speaking humbly as the voice of law by which society presumably consents to be ruled; wooden, in "uncritically resting on formulas," in assuming the familiar to be the necessary, in not realizing that any problem can be solved if only one principle is involved, but that unfortunately "all controversies of importance involve, if not a conflict, at least an interplay of principles.

The awesome reach of the powers of the Supreme Court and the majesty of the functions entrusted to nine mere mortals are not absolute. These judges are bound by the restrictions of the judicial function. They are subject to the task "of solving a problem according to the rules by which one is bound." As Chief Justice Hughes asserted: "We do not write on a blank sheet. The Court has its jurisprudence, the helpful repository of the deliberate and expressed convictions of generations of sincere

minds addressing themselves to exposition and decision, not with the freedom of casual critics or even of studious commentators, but under the pressure and within the limits of a definite official responsibility."

A "largeness of view" is so essential for adjudicating the great issues that come before the Court. That largeness of view which can be nurtured only by a well read and cultivated mind is essential in giving breadth and depth to the understanding of legal problems which naturally influence their opinions. These qualities will most solidly establish the Court in the confidence of the people, and the confidence of the people is the ultimate reliance of the Court as an institution.[147]

Of course, at the core of any considerations and qualities necessary in judicial appointments so thoughtfully presented above by Justice Felix Frankfurter, is ideology. Ideology, which encompasses the nature of the union, who shall govern, and how the people shall be governed, and the nature of the relationship of the Supreme Court to the people in expounding the Constitution. Indeed, ideology is the sine qua non of this unfolding process--and should be. To suggest that ideology not be taken into account in the judicial nomination/confirmation process is not only unsupported by the historical record, it narrows the Senate's role in the assessment process of judicial nominees, thereby frustrating the concept of checks and balances so central to the Constitution. To look only at the professional credentials and judicial experience is not enough. It is like boarding a train because you like the masterful way in which the

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A Response to Professor Robert E. Park's "Giving Meaning to the Constitution: Competing Visions of Judicial Review"

By

J. Clay Smith, Jr.*

Professor Park has provided us with a provocative and enlightened exposition in his paper entitled, "Giving Meaning to the Constitution: Competing Visions of Judicial Review."

The question is: What theme has been offered by the speaker for intellectual consumption?

One theme is central to Professor Park's presentation: that there ought to be a nexus between the will of the people and the disposition of case and controversies decided by the United States Supreme Court.

Professor Park names this theme, or describes this theme as "super-majoritarianism ..., a new standard for validating or legitimatizing constitutional interpretations" during judicial review. \176

I will return to the nexus between the will of the people and judicial review shortly after I hopefully, properly summarize how Professor Park arrives at "super-majoritarianism" as a legitimate standard for judicial review.

Professor Park attempts to lay the foundation for "supermajoritarianism" by commenting on Mr. Justice Thurgood Marshall's Mauri, Hawaii, speech, in which Marshall concluded that the Constitution, when adopted, made it an imperfect, indeed, a flawed document.

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*Following Professor Robert E. Park's paper presented at the Twelfth Annual Meeting of the District of Columbia Court of Appeals Judicial Conference on June 12, 1987, J. Clay Smith, Jr., Dean of Howard University School of Law, responded. Professor Park is a member of the law faculty at George Washington University School of Law.

Professor Park concedes that "Justice Marshall did the nation an important service in reminding [the nation] that the treatment of slavery by the founding fathers constitutes a continuing blot on the history of the constitutional convention. ¶8

Professor Park then closes in on Marshall's language that "The Constitution [is] a living document" interpreting Marshall's criticisms as substantial justice. As a matter of substantive justice, Professor Park has no objection to Marshall's speech.

However, as a matter of "constitutional analysis, constitutional reasoning," Professor Park, recognizing that other distinguished scholars — indeed the majority of them -- hold Marshall's "popular" view, says that Marshall presents a "highly controversial theory of how we should interpret the Constitution." ¶9

Throughout his paper, Professor Park stalks the question: "do we have a living Constitution?" He pokes and tugs at the question because, from my point of view, he is very uncomfortable with all standards of judicial review accepted as legitimate by the majority of jurisprudents today.

Professor Park is very deferential to his peers and bends over backwards not to offend. However, like an ordinary scholar in the jungle of ideas, his intellectual guerilla warfare results in casualties. Word has it that three theoretical standards of judicial review have fallen in Professor Park's classroom of ideas at George Washington Law School, where he teaches.

Casualty One. Original Intent.

This theme emphasizes that the Constitution is a legal document, and analogizes it to other legal documents, like contracts and wills. Professor Park aims his intellectual gun at original intent and strikes a telling blow to this theme because he believes it has "severe constraint upon the

use of judicial power." §83.1 Rather, Professor Park suggests that "the original language must become increasingly merely a starting point." §137 Not without reservations, he concludes that "the evidence of [original] intent is ... fragmented [even] thin ..." §140

Casualty Two. The Instrumental (or Political) Constitution.

This theme, he says, uses constitutional law for a judicial political agenda; it is not neutral, but result-oriented. §83.3 Why doesn't Professor Park like this one? He says that the Instrumentalists "bring to constitutional law ... a ... set of preferred outcomes ... and [their] values are bent to serve these outcomes." §149

Casualty Three. The Moral Constitution

The moralist barely escapes the academic machine gun of Professor Park. The moral Constitution "treats consitutional inquiry as moral inquiry:" a moral mandate, and discounts procedure, legal coherence, precedents and logic, and stands as a bare assertion, says Professor Park. §§83.4, 123

Surviving: The Living Constitution

The only surviving prisoner of Professor Park's academic war is the Living Constitution, the one that Mr. Justice Thurgood Marshall referred to in his Mauri, Hawaii, speech. §13 The Living Constitution emphasizes the inescapability of change, and perceives the Constitution as the focal point of what is, at least by analogy, a continuing constitutional convention. §83.2 Professor Park also draws on the words of Mr. Justice William Brennan as falling under the Living Constitution umbrella. §12

Let's return to the standard of judicial review offered by Professor Park. In reading his paper, one must constantly keep their eyes on the noble objective of its author: he seeks a new standard of judicial review termed "super-majoritarianism of American Sovereignty" involving the interpretation of the United States Constitution. ¶41

What method or logic does Professor Park utilize to reach his conclusion that there should be a nexus between court decisions and the will of the people?

First, he points our attention to the fact that some of the Framers of the Constitution such as Randolph, insisted that the ratification should be referred to the people (¶15), as opposed to Congress or the state.

Secondly, he points to the Tenth Amendment that the implied sovereignty resides in the states, the political unit nearest the people.

Thirdly, he points to the Amendment Process which requires ratification by 3/4 of the states.

These references to constitutional history seem to be the gravamen of Professor Park's theory of "super-majoritarianism."

Professor Park points his magnifying glass at the Constitution and concludes that the Constitution is a body of words from which few rules can be drawn without interpretation. He rightly concludes that much of the constitutional law is unwritten.

The people live by and are affected by the unwritten Constitution. Park asks: How can the gap, the ambiguities, the meaning of the words in the Constitution, be made legitimate to the people of the nation? Indeed, how can our instrument of rule, the Constitution, be authoritative?

The answer is that the language of the Constitution, its words and

phrases, its dashes and dots, are authoritative, if their interpretation is canalized, within bounds of legitimate interpretation.

Again, I remind you that Professor Park has a stated goal in his paper and that beckons us to consider "super-majoritarianism" as a standard for judicial review of constitutional claims. I get the feeling, even with the deference paid to traditional, or popular standards of judicial review, that such standards do not satisfy Professor Park's test of legitimacy, or authenticity. (¶44) In fact, the unstated rumblings in his paper may even suggest that modern standards of judicial review of constitutional claims are authoritarian. These rumblings are heard via his words which indirectly ask where do judges get the power, if there is any, to reinterpret, to recast and to reform the Constitution of the United States? ¶138 It sounds like an Edward Meese or Judge Robert Bork question, but Professor Park would assure us, I think, that he is not in that analytical camp.

What then is the vision of Professor Park concernig judicial review? What makes the analysis of constitutional interpretation authentic to or legitimate for him?

Professor Park could be satisfied with the following six criteria:

> 1) It should be plainly grounded in the constitutional text. 2) It should set limits to judicial decisions. 3) It should not frustrate the need for legitimate constitutional adaptation and innovation. 4) It should be consistent with the democratic values and the scheme of federalism implicit in the Constitution. 5) It should be usable by judges deciding real cases on real facts over genuine and heated constitutional controversies. 6) It should constitute a plausible use of the Constitution to the legal profession and to the people of the United States. (¶46, ¶128) (emphasis added)

On its face, the test suggested by Professor Park is neither new or novel, except, consistent with his general theme of "super-majoritiarianism"

he adds, in criteria six language which states that the standard of judicial review is legitimate if it "constitutes a plausible use of the Constitution ... to the people of the United States." (¶46)

I sense another rumbling from Professor Park: the people of the nation must believe that the analytical process used by the Federal Courts is plausible to them as opposed to "a professional elite". (¶56) Hence, the judicial review becomes legitimate only if accepted by the people, the "super-majoritarians."

Pursuing his theme of "super-majoritarianism," Professor Park argues that the issue of legitimacy would be not an issue at all if the analytical meaning of the Constitution came from the people. In fact, he "implies that the meaning of the document comes from outside the Constitution..." From whom does analytical meaning come? Again, Professor Park responds: the people. Apparently, he thinks that the judiciary should be as accountable to the people as is the executive and legislative branches of government. (¶¶63-66) But, doesn't such a notion collide with Hamilton's Federalist Paper No. 78, calling for an independent judiciary? The Federalist 502, 504 (The Modern Library Ed. n.d.). I think it does. Hamilton would, I am sure agree with me. Professor Park disagrees. ¶¶180, 181

I think that we should press Professor Park for an answer to this question: How many people in the nation are qualified to provide the U.S. Supreme Court with analytical advice in deciding cases?

Under the "super-majoritarianism" standard of judicial review, prior to a vote on a case, should the Court ask the pollster what the views are of the super-majority? Should what the people say matter to the Court?

Professor Park himself is sensitive to a criteria for judicial review

that is so restrictive that the courts employ pollsters as law clerks to analyze a decision prior to its release. ¶70

Professor Park justifies his thesis by an analogous reference to the requirement of 3/4 of the states to ratifying the Constitution.

I think we've determined exactly what Professor Park is after by his analogy: 3/4 of the people must constitute a national super-majority to validate, authenticate and legitimize a "plausible use of the Constitution" by the Courts. (¶46, ¶47)

I'm sure that my interpretation of Professor Park's thesis is correct because he wants his position understood. Using Brown v. Board of Education as an example, Professor Park states that the constitutional analysis and reasoning of Brown was supported by a changing national value as to equality. (¶67) He states that the majority of the people were willing to accept racial equality as a national value; hence, the decision was a "plausible use of the Constitution." Professor Park validates the public's acceptance by referring to Chief Justice Earl Warren's memoirs "that the Court received relatively little mail after the Brown decision, in contrast to some other cases." (¶67)

The people may have accepted the principle of equality in the abstract, but certainly not in the appliciation of Brown. Professor Park doesn't provide much guidance on the difference between "plausible use of the Constitution" as opposed to application. (¶186)

For many Americans, equality in the abstract is akin to Kirkegaard's analogy of giving a cookbook to a hungry man. I submit that the legion of cases following Brown, among them Cooper v. Aaron, 358 U.S. 1, 18 (1954) fully support my view.

I think that we owe Professor Park's offer that we consider another element of judicial review serious consideration: if not for to praise him for his assertions than for to bury him for making them.

Before closing, as Professor Park himself has pointed out: as a populous he can live with the Living Constitutionalist. Their reasoning is "attractive" to him as a matter of judicial governance. ($170) But Park remains skeptical. Why? He wants the judge's presumption as to constitutional values to be at least three fourths of the values of the people. If that quota isn't reached -- under the super-majoritarianism standard of judicial review — the decision of the court is not legitimate.

I commend Professor Park for his thought-provoking paper.

Ladies and gentlemen! I now return the podium to the people of the United States -- Professor Robert E. Park.

TOWARD PURE LEGAL EXISTENCE: BLACKS AND THE CONSTITUTION*

By

J. Clay Smith, Jr.**

> Although the Constitution was at best imperfect ... If interpreted justly, in full awareness of today's conditions, and if applied in a consistent fashion, the Constitution can be converted into a document of liberation for black America.1/

The Negro was brought to America as a slave in 1619. Since the day Blacks landed on the shores at Jamestown, law and custom have significantly influenced their lives. The constitutions of the various states of the Union and the U.S. Constitution have been interpreted in many ways in years past to limit the progress of Blacks in the American society. Constitutional interpretations by the courts and legislative enactments by men and women of good will have also advanced the position of Blacks in the American society. The question today is: How is the Constitution of the United States to be interpreted as relates to the interest of Black Americans? This is a most compelling question as Americans celebrate the bicentennial anniversary of the United States Constitution.

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* This paper was presented on June 18, 1987, at the Distinguished Lecture Series of the Schomburg Center for Research in Black Culture, The New York Public Library, commemorating the Bicentennial of the United States Constitution.

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1/ F. McKissick, 3/5 of a Man 55 (1969).

In Colonial America, the American Negro landed at Jamestown in the Fall of 1619. During the next three hundred years, the American Negro was systematically separated from the white population by both law and custom. In fact, the law was used as a tool for social engineering to reduce the Negro from the metaphysical classification of human to that of chattel, from an original classification of freedom to the status of slavery.

A.

Toward Pure Legal Existence

The bicentennial of the Constitution is an important celebration for this nation. Its celebration is for all Americans. During this celebration, people from all regions, age and ethnic groups, and political persuasions, will provide greater insight and historical perspective on the meaning of the Constitution. The discussions, indeed the debates, that will ensue regarding its interpretation, will no doubt strengthen our collective judgment, renew our faith in what the Constitution represents to the world, and strengthen our determination to have it live up to its tenets for all Americans.

Black Americans join the nation in celebrating the bicentennial of our instrument of rule. However, this year will cause Black Americans to speak the truth about the agony, and violence, the human disregard, the ignorance, and the economic and human despair resulting from the exclusion of Blacks from the definition of legal existence. The fact that Blacks were excluded from the definition and the panoply of causal effects can be easily documented.

While many Americans will dwell on the writings and political activities of Jefferson, Madison, Jay, and leading contemporary constitutional law scholars, many Black Americans will use this bicentennial year to honor the

unsung national heroes and heroines, the men and women of color who were deprived of their liberty by the phantom whims of segregated systems whose doors closed to other than white faces.

Professor William Robert Ming appropriately reminds us that "The legal status of Negroes ... cannot be determined solely by reference to the written sources of law [such as the Constitution because] they do not entirely disclose the real legal status of Negroes."2/ Professor Ming chides us to remember that the words of the Constitution are no more than words. Professor Ming asserts that "it is the law in operation which determines the real legal status of Negroes."3/ One can hardly disagree with Ming's assessment that no discussion of change in the legal status of Blacks can occur without evaluation of the law in operation.

I wish to assert a belief that urges, if not compels, acceptance among constitutional scholars of America. It is this: The decision by the Framers to allow slavery after the ratification of the United States Constitution was a moral flaw in the Constitution. It was morally wrong, and further,

> To the extent that the uneven and disparate application of the law has left any notion of the lack of the worth and human dignity of black people, or has interfered in any way with their natural right to freely participate in a republic born on a philosophical base that all men are created equal under law — to that extent, black people have been denied a pure legal existence. Pure legal existence looks to the future but studies the present and the past of the law that touches black

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2/ Ming, "Legal Status," The Integration of the Negro Into American Society 197 (1951).

3/ Id. at 201 (emphasis added).

people and those similarly situated, in order to trace, to ascertain, and to analytically assess the growth of how near they are to an existence which is free from racial discrimination. Pure legal existence, then, is an existence, under law, which is barren of racial discrimination in law and in its application; it encompasses being in a society in which the accouterments of slavery are no more.4/

B.

The Mauri Doctrine

On May 6, 1987, Mr. Justice Thurgood Marshall delivered a speech commemorating the bicentennial in Mauri, Hawaii. In this speech, now referred to as "The Mauri Doctrine," Mr. Justice Marshall reminded the world that the Constitution, when adopted as our instrument of rule, was defective.

What was the defect? When adopted, the United States Constitution contained three provisions regarding Black people. One provision, Article 4, Section 2c, provided that fugitive slaves were to be returned to their masters. The second provision, Article 1, Section 2C, concerning Congressional representation, stated that in determining Congressional representation, three-fifths of the slave population was to be added to the free population. Some have argued that the three-fifths rule constitutionally defined Black people as property, as subordinate to the more exclusive definition of a person afforded to all others whose skin was white. The third provision, Article 1, Section 9, a compromise between the Southern and Northern interest, sanctioned the African slave trade for twenty years.

As Mr. Justice Thurgood Marshall said:

> No doubt it will be said when the unpleasant truth of the history of slavery in America is mentioned during this

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4/ Smith, Memoriam to Frank D. Reeves, Towards a Houstonian School of Jurisprudence and the Study of Pure Legal Existence, 18 How. L.J. 1, 5 (1973).

> bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances would not have been made. But the effects of the Framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.5/

As Americans celebrate the bicentennial of the United States Constitution and the significant acts that took place in Philadelphia two hundred years ago, Mr. Justice Marshall reminds America that it cannot lose sight of the reality of the conditions which gave rise to the enslavement of Black human beings. Americans cannot and must not be allowed to celebrate the two hundredth birthdate of our instrument of rule, without remembering that it denied constitutionally ordered liberty to Black people. If we forget, and if the nation forgets the effects the denial of liberty caused in the misery, the suffering, and the inhuman brutality on Black people, then, the national celebration of the two hundredth anniversary of the United States Constitution may well be a disingenuous celebration.6/

The ink on Mr. Justice Marshall's speech had not dried before it was criticized as an unfair and narrow portrayal of the Framers of the Constitution. However, as hard as it is for some Americans to swallow,7/ Mr.

5/ Remarks of Justice Thurgood Marshall, at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Mauri, Hawaii, May 6, 1987 at 5-6. (Hereafter Mauri Doctrine).

6/ Id. at 8. See Marshall, An Evaluation Of Recent Efforts To Achieve Racial Integration In Education Through Resort To The Courts, 21 J. Negro Ed. 316-327, 335-336 (1952). (Denial in area of education discussed by Thurgood Marshall.)

7/ See, e.g., Thurgood Marshall's Constitution, The Detroit News, May 10, 1987, at A22, col. 1; Yoder, That 'Defective' Constitution, Wash. Post, May 14, 1987, at A25, col. 1; Francis, Wisdom Marshall could have used, Wash. Times, May 15, 1987, at 3D, col. 1; Goldwin, Why Blacks, Women and Jews are not Mentioned in the Constitution, Commentary, May, 1987 at 28; Hodel, In Defense of Constitution, N.Y. Times, May 13, 1987, at A20, col. 1; Constitution Defended From Marshall Criticism, Los Angeles Sentinel, May 28, 1987, at A16, col. 4; July, Constitution Wasn't About Justice, but Order, N.Y. Times, May 31, 1987, at E28, col. 4; Waite, People's Slavery, N.Y. Times, June 12, 1987, at A30, col. 4. See also, D. Bell, Race, Racism and American Law 49-50 (1973) (quoting S. Lynd, Slavery And The Founding Fathers 119-131 (M. Drimmer, ed. 1968)) for a different view on why the word "slave" was not used in the Constitution.

Justice Thurgood Marshall is correct in his assertion that the Framers of the Constitution intentionally excluded Blacks from the reaches of constitutional guarantees, thereby rendering the document flawed.8/ The views of Justice Marshall are important to any national debate on the original intent of the Constitution. As the first and only Black American to sit on the United States Supreme Court his views should cause Americans to face the fact that our Constitution, for whatever reason, made slavery a legally permissible status.

How could Justice Marshall, trained at Howard University School of Law,9/ allow this year to pass without reminding the nation of the truth? If Justice Marshall had remained silent, if he had allowed the apologists to bury the truth, he would have betrayed the teachings of his mentor Dr. Charles Hamilton Houston,10/ the efforts of his life's work and that of other Black lawyers, and

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8/ See, e.g., Mauro, Burger on Constitution: 'It isn't perfect.' USA Today, at 1, col. 2; Justice Marshall's Critique, Wash. Post, May 9, 1987, at A22, col. 1; Gilliam, Constitutional Outrage, Wash. Post, May 18, 1987, at C3, col. 5; Payne, A Flawed Constitution, Wash. Afro-American, May 19, 1987, at 5, col. 1; Molotsky, Slavery Issue Adds Vigor to Debate, N.Y. Times, May 21, 1987, at A22, col. 4; Jacob, Celebrating the Bicentennial, Wash. Afro-American, May 26, 1987, at 4, col. 1; Cohen, The Constitution Through Marshall's Eyes, Wash. Post, May 12, 1987, at A19, col. 1; Fleming, The Constitution, Wash. Afro-American, May 30, 1987, at 5 col. 1; Kamen, Marshall Blasts Celebration of Constitution Bicentennial, Wash. Post, May 7, 1987, at 1, col. 1; Observing the Constitution, Wash. Afro-American, June 2, 1987, at 4, col. 1; Keith, The Celebration of a Living Document, The Detroit News, June 2, 1987, at 8A, col. 1.

9/ Thurgood Marshall was graduated from Howard University School of Law in 1933.

10/ See G. R. McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights 77-79 (1983); reviewed by Smith, Forgotten Hero, 98 Harv. L. Rev. 482, 487, n. 27 (1984); R. Kluger, Simple Justice 131 (1976). See also, J. M. Langston, "The Intellectual, Moral, and Spiritual Condition of the Slave," Autographs Of Freedom 147 (J. Griffith, ed., 1854). (Marshall's principles draw on those of John Mercer Langston, who, in 1854 stated, "The American slave is a human being." In 1868, Langston became the first dean of Howard University School of Law.)

laymen alike, who contributed so significantly to cure an inchoate document.11/

C.

Constitutional Fear and Bifurcation of Blacks

The Framers of the Constitution attempted the impossible: they attempted to deny the human existence of Black people. However, the existence of the slave could not be denied, even though he could assert no rights under his status as property. The Framers of the Constitution bifurcated the slave and granted a limited existence for the commercial and political benefit of persons other than himself. Legal existence being denied, Black people were rendered powerless to defend their person, their property or to stake out a claim in a nation that considered them legally invisible.

D.

Reversion to Originally Free Status Created Fear

It was the original intent of the Framers of the Constitution that slavery would end in 1808. However, once slavery was legalized in the nation it was not to be easily dislodged — not even on moral grounds. If one were white, rights to life, liberty and property in the State were claimed to be naturally endowed by God. However, if one were Black, rights were not natural. Black people were not considered originally free.12/ If slaves were to revert to their

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11/ See Hastie, The Proposition of the Negro in the American Social Order, 8 J. Negro Ed. 595 (1939); A. L. Higginbotham, Jr., In the Matter of Color (1978), P. Finkelman, Slavery In The Courtroom 3-15 (1985).

12/ See e.g. The Jewish Record, January 23, 1863, quoted in B.W. Korn, American Jewry and the Civil War 27 (1951) (contending that Blacks were not originally free); But see, M. Willis, "The Bible Versus Slavery," Autographs of Freedom 151 (J. Griffiths, ed., 1854); J. H. Cone, A Black Theology of Liberation, 90-94 (1986) (Cone writes, "The being of the human person as freedom is expressed in the Bible in terms of the image of God."); Nelson, The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America, 87 Harv. L. Rev. 513, 525-536 (1974) (arguing that the moral and political elements of antislavery thought merged into a single antislavery jurisprudence).

originally free status, a belief always held by Blacks, this would have vested them with the same rights and privileges as whites. The thought of such reversionary rights created fears against Blacks. Some believed that Blacks posed dangers to the State and such discourse was used to prolong the institution of slavery.

According to some documentation in Albert J. Beveridge's Life of John Marshall, Marshall himself might have believed that Blacks threatened the State. In a letter Marshall wrote to Reverend R. R. Gurley in 1831, he said,

> The removal of our colored population is, I think, a common object, by no means confined to the slave states although they are more immediately interested in it. The whole Union would be strengthened by it, and relieved from a danger whose extent can hardly be estimated.13/

One author has asked: "What was this terrible danger which ... threatened the country through the colored population?"14/ She concludes "that amalgamation was one probable fear, and the other ... was social commingling."15/ Hence, white people feared integration of Blacks into American life as a matter of social, political and economic principle which provided the legal basis for the classification of Blacks as legally impotent.

The expansion of social status of many in the South was predicated on

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13/ A.J. Beveridge, Life of John Marshall, Vol. IV, at 475 (1919), quoted by Thelma D. Ackiss, "The Negro and The Supreme Court To 1900," Masters Thesis, Howard University, 1936, at 36 (hereafter Ackiss). Ms. Ackiss was graduated from The Howard University School of Law in 1931.

14/ Id. at 36.

15/ Ibid.

the possessory interest, protected by law, of Black people. As J. E. Caines wrote, 16/

> [S]lavery in the South is something more than a moral and political principle; it has become a fashionable taste, a social passion. The possession of a slave in the South carries with it the same sort of prestige as the possession of land in this country, as the possession of a horse among Arabs, it brings the owner into connection with the privileged class and forms a presumption that he has attained a certain social position.

It is my belief that it was this very presumption that worked its way into the framing of the Constitution in the bifurcation of slaves as property and as persons for reasons unrelated to their legal existence. This was an act that defied reason and nullified the very words of the Declaration of Independence: "We hold these Truths that all Men are created equal..."17/

16/ J. E. Caines, The Slave Power 90 (1862) (quoted by Ackiss, supra note 13, at 37). Some Blacks were freed by their masters or otherwise gained their freedom before the Emancipation Proclamation in 1863. However, the operation of the law and custom did not advance their status or the fullness of their legal existence. See Free Blacks In America, 1800-1860, at 24, (B.M. Rudwick, ed., 1970). See also, C.G.Woodson, A Century of Negro Migration 37-38 (1918) (statistics of the free colored population of the United States 1850 and 1860). Id. at 39-60 (regarding the passage of Black Codes in the North to limit the legal existence of free Blacks.)

17/ D. Bell, Race, Racism and American Law 45-47 (1973). M.F. Berry, Black Resistance to White Law 7-18 (1971), reviewed by Higginbotham, Race, Racism and American Law, 122 U. of Pa. L. Rev. 1044 (1974).

E.

Legal Existence Slowed Under Early Supreme Court Developments

There came a time that states such as Virginia and Kentucky drew up resolutions drafted by Jefferson and Madison in 1798, to limit Congress' authority to exercise its powers. It was believed that such resolutions were designed to protect the institution of slavery. Even Chief Justice John Marshall himself is thought to have shared the beliefs that the authority of the federal government should be limited. However, Chief Justice Marshall "soon brought the country around to the position of thinking that although the federal government is one of enumerated powers, that government and not that of the states is the judge of the extent of its powers and, 'though limited in its powers, is supreme' within its sphere of action."18/ Justice Marshall in redemptive fashion went on to write that "there is no phrase in the instrument ... which excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described."19/

Marshall's decisions are important to the crusade of Black Americans because, though not immediate, his view that the Constitution was the Supreme Law of the Land, and not subordinate to dictates of the States 20/ would sanction legislative acts passed to secure and to protect the civil rights of Black Americans.21/

18/ C. G. Woodson, Fifty Years of Negro Citizenship As Qualified By The United States Supreme Court, 6 J. of Negro History 1, 2 (1921) (quoting McCulloch v. Maryland 17 U.S. (4 Wheat.) 316, 404, (1819). The page referred to by Woodson (416) is an error.

19/ Id. at 2, at 404.

20/ Cooper v. Aaron, 358 U.S. 1,4, 18-19 (1958).

21/ See e.g., United States v. Raines, 362 U.S. 17 (1960); United States v. Thomas, 362 U.S. 58 (1960), United States v. Alabama, 362 U.S. 602 (1960).

It was not "until after John Marshall of Virginia became Chief Justice, are to be found cases involving Negro rights." 22/ A careful review of the cases involving Blacks during the period that Chief Justice Marshall was on the U.S. Supreme Court did not disclose a chronology of cases which gave meaning to the legal existence of Black people. The death of Justice Marshall in 1835 would usher in Joseph Story as Chief Justice and, to some extent the abandonment of Marshall's view of a strong central government. The nation drifted towards the supremacy of local governments and Black people drifted toward an extended period of legal non-existence.23/

In 1836, Roger Taney was confirmed as Chief Justice of the United States Supreme Court. He served in that capacity until his death in 1864. While Taney may be credited with developing certain aspects of American jurisprudence, scholars who support his work, his opinion, and that of the majority of the Court in Dred Scott v. Sandford,24/ did little to advance the legal existence of Black people.

In the Dred Scott decision, Chief Judge Taney posed a question touching the metaphysical intent of the Framers of the Constitution. It was this: "Can a negro, whose ancestors were imported into the country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights and privileges, and immunities guaranteed by that instrument to the citizen?" 25/ The answer to the ques-

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22/ Ackiss, supra note 13, at 1-106. (These cases are discussed in some detail in this excellent thesis.)

23/ C.G. Woodson, supra note 18, at 10.

24/ 60 U.S. (19 How.) 393 1857.

25/ Id. at 403.

tion posed was "No." The answer to this question by the court is ample evidence that Black people were viewed as non-beings as a matter of jurisprudential thought. To be a person under the Constitution, one had to be a citizen; to be a citizen, one had to be a person. Since both the words citizen and person were described by Mr. Justice Taney to be "synonomous terms,"26/ Black people did not fall within the legal definition of constitutional metaphysics. Then, what rights, duties or obligations were granted to the creatures of the African race under the moral imperatives stated in the Constitution? The answer from the pen of Mr. Chief Justice Taney would forever cast a cloud over the most revered branch of our nation's government. Even as Taney tried to further debase Blacks, he could not write about them without admitting that Blacks were "regarded as beings [although] of an inferior order..."27/ Taney sealed the fate of Blacks under the Constitution with words that rang out across the land. His words were as follows:

> [Blacks] had for more than a century before been regarded as beings of an inferior order, and although unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.28/

26/ Id. at 404.

27/ Id. at 407.

28/ Ibid.

F.

Legal Existence Granted Blacks

On January 1, 1863, President Abraham Lincoln emancipated the slaves by Proclamation. However, according to Constance Baker Motley, this Proclamation was "a nullity."29/ In 1963, she wrote that the Proclamation "was intended to free only those slaves in states or parts of states which, on January 1, 1863, were still in rebellion against the United States."30/ Slavery in non-rebellious states retained its previous legal status causing the need for a Constitutional Amendment.

In 1865, the Thirteenth Amendment was ratified and made part of the Constitution. The Thirteenth Amendment, the first "Negro Amendment", breathed legal life into a newly freed Black American. It made involuntary servitude a federal crime.

On July 28, 1868, the Fourteenth Amendment granted the status of citizenship to Blacks and cured the metaphysical flaw that denied legal existence and federal protection to Blacks in the states in which they resided.

Passage of the Fourteenth Amendment has been described as "the Negro's charter of liberty." 31/ However, it and the other Negro Amendments were more than a charter of liberty. The Negro Amendments provided grants of legal existence heretofore denied to Blacks by the Framers of the Constitution. These Amendments would gradually move Blacks towards pure legal existence in our constitutional democracy.

29/ Motley, The Constitution -- Key to Freedom, 28 Ebony 221 (Sept. 1963).

30/ Ibid.

31/ B. H. Nelson, "The Fourteenth Amendment And The Negro Since 1920," Ph.D. Dissertation, Catholic University, at 1 (1946). See also, J.A. Cobb, "The Constitutional Rights of the Negro or Race Distinctions in American Law," in F. Styles, Negroes and the Law 63-87 (1937).

The grant of legal being to Black people was an act that would not immediately end the legitimacy of slavery in the minds of whites in many southern states. For, after all, it remained their view that the white man was not required to treat Blacks as equals or to protect them as such. Whites feared Blacks — as Chief Justice Marshall had written. They feared the exercise of the very political freedoms claimed when the nation was formed and the Constitution was written. This was especially true in the exercise of the franchise. For example, on December 16, 1868, the Houston Telegraph gave the following advice to Negro freedmen in Texas: —

> You are aware that a very large majority of the white people of Texas are opposed to allowing all of you to vote, because they do not think you are qualified to exercise this high privilege. If the Convention should confer suffrage upon you it will be the very cause of its being taken away from you after awhile, and we believe that it would deprive you of it forever.32/

Shortly thereafter, one C.W. Bryant, a Black member of the Texas Legislature, responded thusly,

> Now Sir, I ask one thing: Why is it that the white people are crying daily, 'Let us vote?' If a free man can live so well in a free country without a voice in the Government, why not try it yourself for awhile?

32/ J. Mason Brewer, Negro Legislators of Texas 23-24 (1935).

> No Sir; give us the ballot and give it to us for all time, and then if you can outrun us in the race of life, all is well.33/

By 1905 the Black voter in Texas was disfranchised. Again the fear that Blacks would rise up and claim their original legal existence caused political alarm. As one author described the disfranchisement of Blacks in Texas:

> As the Negro became more informed and better educated, and more accustomed to contending for his rights and getting some of them, and as he became more conscious of his power with the ballot, the white Texan became more and more alarmed and disturbed over the Negro vote, and its power in the hands of the colored man.34/

In 1869, one of the most significant important decisions of the Post-Reconstruction period was decided by the Supreme Court of Georgia, White v. Clements.35/ The bare facts are these: a black man was elected Clerk of the Court in Chatham County, Georgia, in 1868. He beat a white contender. The "real vital question at issue" was whether a "person of color [was competent under the law] to hold office in [Georgia]...."36/ The trial court had ruled for the white plaintiff holding that a Black person was not competent under law to hold public office.

33/ Ibid. H.L. Moon, Balance of Power: The Negro Vote 215 (1948); Kousser, "The Undermining of the First Reconstruction," Minority Vote Dilution 27-46 (D. Chandler, ed., 1984).

34/ Id. at 113.

35/ 39 Ga. 232 (1869).

36/ Id. at 241.

In one of the most unusual cases in the South during this period, the Georgia Supreme Court, speaking through Justice McCay, held for the Black incumbent. Why do I draw attention to this decision? First of all, White v. Clements laid the foundation for the right of Black Americans to hold public office in the State of Georgia. Secondly, the decision casts light on the state of mind, perhaps even the minds of the drafters of the Federal Constitution, that Black people, though persons, had no legal existence, and that the distinction between white and Black rights was derived from Divine Right. In short, God did not grant to persons of color any legal status; therefore, white people owed Blacks only such rights as were specifically granted to them by the legislature. This notion was explained in Justice McCay's opinion. There Justice McCay says,

> ... it is still that the case of the Negro stand upon a different footing, and that however it may be true, that the rights of a white American citizen came from God, yet a black American citizen cannot claim this presumption; that the rights of the Negro have a different derivation, they, come from the State, and they can have none, except such as he can show chapter and verse for.37/

Justice McCay, while rejecting this viewpoint, considered the historical argument raised by the white plaintiff attempting to disqualify the Black incumbent who beat him in the election. Justice McCay wrote:38/

Id. at 247.

Id.

> The Negro, they say, was, as all admit, a slave, without any rights, save as were specially pointed out by law, and that having none, became free by special grant, he does not stand like a white man, with every right, that is not expressly denied, but with only such as are specially granted.

McCay continued,39/

> ... in this State [so it was argued] we are to have two classes of citizens, one holding their rights by divine gift from the God of nature, in favor of whom there always exists the presumption that any particular right contended for, whether it be legal or political, and in reference to whom, the burden of proof is always against the party denying the right; and another class, whose rights come not from God, but from society, and who in every contest respecting a right, must be able to show by special enactment, that the right has been granted.

Ironically, even though Justice McCay rejected the Divine Right of people based on race, he held that the Reconstruction statutes by the national government "recognized [the black incumbent] as a part of the sovereign people of the State ... [and therefore Blacks were] entitled to the same presumption as are other fellow citizens..."40/ His decision is bottomed, not only on the practical liberty of man, but on the statutory recognition or grant of the equality of Blacks by authority derived from the national Constitution.

39/ Ibid.

40/ Id. at 255 (original emphasis).

Hence, thirty-eight years after Chief Justice Marshall raised the fear of the liberation of black people in America, a Justice of the Georgia Supreme Court, interpreting that same Constitution, held that to fear the freedom of Black people was to reject the peace and good order of the State.41/

G.

Attainment of Color-Blind Society via Legal Wars

Despite the refusal of the United States Supreme Court to grant social equality to Blacks in Plessy v. Ferguson,42/ the decision did produce a dissent by Mr. Justice Harlan that would prospectively cause Americans to wonder whether the Constitution was color-blind.43/

The history of the legal wars fought by Blacks and whites to secure a social, economic and political color-blind society in America are well known. These wars waged on several legal fronts concerned the existence of Black people. While there is no longer doubt that Blacks are both "citizens and persons" within the public legal definition of those terms, some constitutional scholars have refused to accept, actively tried to contain, or to rewrite the definition using the same arguments that

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41/ Id. at 269.

42/ 163 U.S. 537 (1896).

43/ Id. at 556.

perfected it.44/

Much of the resistence to change was due to the refusal of whites to accept the fact that Blacks were human. Some clung to the notion of Divine Right, which gave whites absolute power over Blacks as their subjects. Others were afraid that Blacks would come to know, understand and collectively assert the very constitutional rights so long denied them, and ultimately lead to a restructuring of the whole society. Many feared this possibility.

To the credit of America, the institution of slavery was outlawed. However, race remained the badge of slavery which, for most Blacks, could not be hidden. Slavery and what it meant to white men remained in the minds of Blacks and compelled them to systematically turn to the Courts to seek a pure legal existence.

Politically, Blacks have had to seek judicial relief to thwart the efforts of those who sought to deny them the right to vote,45/ the right to serve on juries,46/ and the dignity of even sitting in the courtrooms of this nation.47/ The effects of slavery kept Black children from obtain-

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44/ See Smith, Edwin Meese on the Supreme Court, Wash. Post, Oct. 31, 1986, at A26, col. 4; Taylor, Meese and the Supreme Court: He Deals with Critics by Softening His Remarks, N. Y. Times, Nov. 19, 1986, at A16, col. 1, Glasser, Cooper v. Aaron [358 U.S. 1 (1958)]: What Did Meese Mean? Wash. Post, Nov. 24, 1986, at A14, col. 5; Kurtz, Meese's View on Court Rulings Assailed, Defended, Wash. Post, Oct. 24, 1986, at A12, col. 1; Meese, The Lawyer Calls for Anarchy, N.Y. Times, Nov. 2, 1986, at E23, col. 1; Meese, The Tulane Speech: What I Meant, Wash. Post, Nov. 13, 1986, at A21, col. 4; Mr. Meese Replies, Wash. Post, Nov. 14, 1986, at A26, col. 1; Abrams, So Much for Meese's 'Original Intention,' N.Y. Times, June 4, 1987, at A27, col. 1.

45/ Lane v. Wilson, 307 U.S. 268 (1939).

46/ Strauder v. West Virginia, 100 U.S. 303 (1879).

47/ Johnson v. Virginia, 373 U.S. 61 (1963).

ing a competitive education in the South,48/ and relegated them to inferior educations in other sections of the nation.49/ Race restricted Blacks from gaining an education in public, graduate, and professional schools,50/ to purchase homes in white communities,51/ and exposed them to prosecution for marrying a non-Black person.52/ The effects of slavery have caused labor unions to refuse to represent Blacks in labor disputes,53/ and cities to refuse Blacks the use of public recreational facilities,54/ even libraries.55/

If one should doubt that there existed a national effort to limit the legal existence of Blacks, one need only refer to the exhaustive compilation of States' Laws on Race and Color by Dr. Pauli Murray for support of this assertion.56/ This denial to Blacks of full participation in the moral, political, social, and economic offering argued for years as derived from the text of the Constitution is regrettable, in light of the extent to which

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48/ H. A. Bullock, A History of Negro Education in the South (1967); J.G. Van Deusen, The Black Man in White America 159-177 (1938).

49/ Brown v. Board of Education, 347 U.S. 483 (1954).

50/ Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

51/ Shelly v. Kraemer, 334 U.S. 1 (1948). See also, Weaver, Race Restrictive Housing Covenants, 20 J. Land and Public Utility Economics 183 (1944).

52/ Loving v. Virginia, 338 U.S. 1 (1967).

53/ Steel v. Louisville & Nashville Railroad, 323 U.S. 192 (1944).

54/ Lombard v. Louisiana, 373 U.S. 267 (1963).

55/ Brown v. Louisiana, 383 U.S. 131 (1966).

56/ P. Murray, States Laws on Race and Color (1950); P. Murray, Song in a Weary Throat 284-290 (1987) (describes how states laws on race and color came about.) See also, P. Murray, "Constitutional Law and Black Women," American Law and the Black Community Viewed by Black Women Lawyer, Afro-American Studies Program, Boston University, Occasional Paper No. 1, at 33 (1973). Smith, Black Bar Associations and Civil Rights, 15 Creighton L. Rev. 651, 667 (1982).

Blacks have defended this nation on the battlefields of the world.57/

H.

Toward the Twenty-First Century

The bicentennial of the United States Constitution is here. All Americans can and should reflect upon the values embodied in this instrument of rule. The Constitution deserves the support of American citizens. The bicentennial will present an excellent opportunity for Black Americans to review the pages of constitutional history that has denied them the right of full citizenship in their country, as well as those pages of constitutional history that they have written, corrected and re-written.

The question facing Blacks in Colonial America remains unanswered today: What direction will the interpretation of the United States Constitution take in order to obtain, secure and protect the rights of Black Americans?

As we focus our sights on the Twenty-First Century, hopefully, this nation will forever revere and never retreat from the intrinsic worth, embodied in the principle that all persons are created equal, and the principle that all of humankind is originally and legally free.

57/ Houston, Critical Summary: The Negro In the U.S. Armed Forces In World Wars I and II, 12 J. Negro Ed. 364 (1943); Hastie, Negro Officers In Two World Wars, 12 J. Negro Ed. 316 (1943); K. Miller, History of the World War for Human Rights, 439 (1919). I. H. Lee, Negro Medal of Honor Men 139-142 (1969).

HOWARD UNIVERSITY
2900 VAN NESS STREET, N.W.
WASHINGTON, D.C. 20008

SCHOOL OF LAW

September 17, 1987

The Honorable Joseph R. Biden, Jr., Chairman
The Honorable Strom Thurmond, Vice Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senators Biden and Thurmond:

The Committee on the Judiciary of the United States Senate is considering the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States. The undersigned faculty of the Howard University School of Law asks your Committee to withhold consent.

Since 1869, the special mission of the Howard University School of Law has been to battle against racial prejudice and injustice. Students and faculty over the years have played a decisive role in the formulation and refinement of the American law of civil rights. The School of Law has educated and inspired much of the legal talent responsible for the direction of the civil rights struggle.

On this date, two hundred years ago the Constitution was signed. It cannot be overemphasized, however, that Black Americans did not begin to enjoy the benefits of the Constitution until the 13th, 14th and 15th amendments were added over eighty years later. Even today, many of our constitutional rights depend upon judicial interpretation and enforcement rather than on the express language of the original Constitution.

Therefore, we oppose the appointment to the Supreme Court of a person whose interpretation of the United States Constitution significantly conflicts with the interpretation which has been developed under recent decisions, often involving faculty or graduates of this school.

We find Judge Bork to be unacceptable for practical, theoretical and political reasons. In his essays and speeches he has registered hostility towards or pilloried every landmark Supreme Court decision and much of the legislation that is important to Blacks. For example, Judge Bork characterized the 1964 Civil Rights Act as "unsurpassed ugliness." In equally intemperate language, he opposed the elimination of literacy tests and poll taxes; the holding that the enforcement

of racially restrictive covenants was unconstitutional and invalidating a provision of the California Constitution that virtually created a license to discriminate in the sale of property; and he dissents from the one-man, one-vote apportionment decision. Even where Judge Bork does not object to the finding of unconstitutional treatment, he has problems with the remedy granted. Thus, he opposes the landmark applications of the affirmative action remedy and thirty-three years later he still disagrees with using the due process clause of the Fifth Amendment, in Bolling v. Sharpe, to remedy segregation in the District of Columbia school system.

This sampling of Judge Bork's views may or may not justify labelling him as an "ideologue of the extreme right." Nevertheless, prior to his nomination as Solicitor General, he had not met a civil rights decision or statute that he liked. Since then it has been in his narrow interest to recant and to qualify the more extreme of his views, during the proceedings on his nomination to the United States Court of Appeals and now. We believe that Judge Bork's soul is revealed in his earlier writings, not in his recent qualifications of same. This raises the practical question of whether or not Judge Bork is a mind or a man that one can believe? The undersigned neither believe him nor do we accept the risk of playing "Russian Roulette" with whether Judge Bork would participate in the watering down or dismantling of hard fought Supreme Court precedents.

Second, we have an equally profound theoretical disagreement with Judge Bork concerning the balance to be accorded individual rights versus majority rule. Judge Bork expresses a bias favoring the least possible governmental intervention and the narrowest recognition of individual rights and protections in the Constitution. Notably, none of Mr. Bork's writings articulate a theory for preserving or protecting the civil rights of minorities. Instead, he consistently rejects decisions that, arguably, protect minorities from the intolerance of the majority. Indeed Judge Bork favors the majority setting the important standards governing present and future relationships between the people and between the government and the people, without restraint of the Constitution and its guarantee of liberty to all.

A third reason for opposing Judge Bork is that in the 1986 Senate elections President Reagan campaigned diligently for a Senate that would reflect his views on, among other things, the criteria for selecting federal judges. We interpret the election results as a significant repudiation of the President's views. Black citizens and other minority groups have no sympathy for a cribbed view of civil and human rights and we believe that both Mr. Reagan's and Judge Bork's views in this area are "devoid of humanity." Thus, it bears repeat-

ing that the control of the Senate shifted in 1986 in significant part as a result of Blacks voting for a Senate to check the backward march of this administration in the field of civil rights.

Consequently, the appointment of Judge Bork would sanction the use of judicial means to exclude Blacks from the enjoyment of equal protection under the Constitution; the consent to his nomination would mean that decades of positive effort would be eroded; and a vote for Judge Bork is a vote against the best interests of Black Americans and others interested in an enlightened and open society.

While we join with the other groups who are opposed to this nomination, the undersigned urge for your additional consideration the particular point of view of the undersigned faculty members of the Howard University School of Law.

Sincerely yours,

Warner Lawson, Jr.

Michael D. Newsom

Marsha Echols

Loretta C. Argrett

W. Sherman Rogers

Harold R. Washington

Sharon P. Banks

Spencer Boyer

Daniel O. Bernstine

J. Clay Smith, Jr., Dean

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National Association of Criminal Defense Lawyers

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STATEMENT OF

THE HONORABLE JOSEPH TYDINGS

ON BEHALF OF THE

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

REGARDING

THE NOMINATION OF JUDGE ROBERT H. BORK

TO BE AN ASSOCIATE JUSTICE OF THE

UNITED STATES SUPREME COURT

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Mr. Chairman and distinguished members of the Judiciary Committee, it is my pleasure to appear today on behalf of the National Association of Criminal Defense Lawyers, to discuss the nomination of Judge Robert H. Bork to be an Associate Justice of the United States Supreme Court.

My name is Joseph Tydings, and I am a partner in the law firm Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson and Casey. I come before this distinguished Committee today also as a former member of it, and Chairman of its Subcommittee on Judicial Improvements from 1965 to 1971, while I was privileged to represent the people of the State of Maryland in the United States Senate. I also come before you as the former United States Attorney for the District of Maryland, with a profound respect for the need for a strong, aggressive and effective federal law enforcement effort.

The National Association of Criminal Defense Lawyers is a nationwide, voluntary bar association comprised of more than 5,000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecutions and individual rights. It was founded 28 years ago to promote study and research in the field of criminal defense law, and to encourage the integrity, independence and expertise of criminal defense lawyers. Throughout NACDL's history, its members have worked to protect the rights and liberties of those accused of criminal offenses, and to promote the fair administration of justice. The Association has pursued these goals through a variety of educational and public service activities, including national training programs, publications, legislative action, and by appearing as amicus curiae in significant criminal justice cases.

Mr. Chairman and distinguished members of the Committee, on behalf of myself and the NACDL, I emphatically oppose the nomination of Judge Bork to the Supreme Court.

I must emphasize, however, that we do not take this position lightly. Never before in its history has NACDL take a position either for against the confirmation of any individual judicial nominee. Through Democratic and Republican Administrations alike, the Association has recognized the inevitability of Presidents seeking out ideologically compatible appointees for federal judicial vacancies. To be sure, the federal judiciary always has and always will span a broad variety of ideological viewpoints. This is an integral part of the "balance" of both the lower courts and the Supreme Court. It is a balance that can tolerate a wide divergence between the "conservative" and

"liberal" ends of the spectrum, as long as each judge possesses the necessary intelligence, professional qualifications, reasonable judicial temperament, and respect for the rule of law and the fundamental notion of stare decisis.

NACDL has never taken the position, and does not now take the position, that the Senate should reject nominees on the basis of disagreement with their views on substantive issues. Recently, for example, NACDL and individual NACDL members were contacted by offices of various members of this Committee, and by the FBI in conducting its background checks, to see what we knew about and what we thought of Judge William Sessions, to head the FBI, and Deputy Assistant Attorney General Steve Trott, to be a Court of Appeals judge in the Ninth Circuit. In both cases, based on input from NACDL members who were personally and professionally acquainted with the nominees, we were able to report that, despite widespread disagreement with the nominees and their philosophies on a broad range of substantive issues, our members supported the appointments, voicing nothing but praise for the intellect, temperament, fairness and integrity of both gentlemen, and were pleased to endorse their nominations most highly.

Similarly, I personally have consistently adhered to the position, as I stated to Judge Clement Haynsworth--whose nomination I ultimately voted against--during the 1969 Judiciary Committee hearings on his nomination to the Supreme Court, that "barring some unusual situation, a man selected by the President for the Federal bench should be confirmed by the Senate if he has demonstrated a proper judicial temperament, an intellectual capacity equal to the task set for him, and a character beyond reproach." I stated then that "I have long believed that an individual Senator's agreement or disagreement with the views that he believes the nominee holds on particular issues or his findings in particular cases should not be a controlling consideration on the issue of the nominee's confirmation."

At the same time, nevertheless, I stated my conviction that "a nominee to the Supreme Court should subscribe to a judicial philosophy which in general would contribute to the High Court's critical role in our system of government."

In other words, Mr. Chairman, I do not intend to argue--and I do not believe it is necessary to argue, in order to oppose the nomination of Judge Bork--that Senators ought to reject nominees simply because they disagree with them. As an aside, I do find it curious, however, that some of the voices objecting most loudly today to the consideration of Judge Bork's views and philosophy, have been heard, during Administrations past, taking quite the opposite position. For example, during floor debate on the Carswell nomination in 1968, Senator Howard Baker, now President Reagan's chief of staff, argued that the factors that

the Senate "must consider" include the nominee's "social, economic and legal philosophies." Cong. Rec., September 26, 1968, at S28258. And my distinguished colleague, Senator Strom Thurmond, took the position quite passionately, during the 1968 hearings on the Fortas nomination (hearing record, at page 180), that the views of the nominee are relevant to the Senate's deliberations. Indeed, I know of no more forceful proponent of this position than my good friend from South Carolina; many is the time I stood in awe of his skill and his determination in utilizing Judiciary Committee procedures to effectuate a Minority blockade of President Johnson's federal court nominees whose names were sent to the Senate in 1968 and who may have been thought too liberal for the times.

I am here today to urge that the nomination of Judge Bork be rejected, not because I disagree with him, but because I am absolutely convinced that the sum total of his views--his unsurpassed and unrepentant indifference to governmental encroachment upon individual liberties, his outcome-driven legal reasoning, his political and ideological activism cloaked in the mantle of judicial restraint, his disrespect for the rule of stare decisis--all reveal that he is lacking in the necessary judicial temperament and integrity to assume the high position which he has so ardently and for so long sought. Indeed, the subject of this testimony might well be phrased: "Will the real Judge Bork please stand up."

CRIMINAL LAW ISSUES

There has not been a great deal of discussion--and absolutely no critical discussion--at these hearings regarding Judge Bork's views in the area of criminal law. But they must be discussed, for they are deeply troubling, and confirm the biases that crop up in so many other areas of his thinking.

Because of the D.C. Circuit's relatively small criminal docket, Judge Bork has written only a dozen opinions on criminal issues during his five years on the federal bench. In every single one of them, he came down on the government's side.

Exclusionary Rule

In a concurring opinion in United States v. Mount, 757 F.2d 1315 (1986), Judge Bork broached the issue of his antipathy to the Exclusionary Rule, discussing at length the court's lack of "supervisory power" to craft an exclusionary rule for evidence improperly seized by foreign officials: "Where no deterrence of unconstitutional police behavior is possible," he wrote, "a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the

judicial conscience even more than admitting the evidence." Then, clarifying that he had problems not only with crafting new exclusionary rules but also with keeping the old, he stated in a 1986 interview with the Free Congress Foundation that: "I have never been convinced by [the] argument [that 'courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence'], because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society. The only good argument rests upon the deterrence rationale, and it's time we examine that with great care to see how much deterrence we are getting and at what cost."

I believe it is fair to take these statements as reflecting the likelihood that Judge Bork, if he became Justice Bork, would work to obliterate the exclusionary rule entirely. Others share this assessment, including the distinguished Senate Majority Leader, Bob Dole, who told a gathering of the Fraternal Order of Police on August 13 that he understands Judge Bork to be an outright opponent of the Exclusionary Rule, and that if the nomination is confirmed, "the Supreme Court might well agree to do away with the Exclusionary Rule altogether."

Let us be clear about what is being advocated here. Judge Bork does not suggest any fine tuning, incremental restrictions, or "good faith" exceptions currently favored by the conservative wing of the Court. And in Congress, in the wake of the decision in United States v. Leon, 468 U.S. 897 (1984) (creating a "good faith" exception for searches conducted with a warrant), legislation has advanced periodically in both Houses--but never been enacted--to extend that "good faith" exception to warrantless searches. The lone piece of legislation going further than that--Senator Hatch's bill to repeal the Exclusionary Rule altogether--has gone nowhere, and rests, legislatively dead in the water, on the extreme political fringe of the Exclusionary Rule debate.

Most conservative Members of Congress, it would appear, while disturbed by the notion that a criminal might go free "because the constable blundered," recognize that the Exclusionary Rule, like it or not, is the one and only protection against the police seizing evidence and making arrests in blatant violation of an individual's rights under the Fourth Amendment--the right to be free from unreasonable searches and seizures, and to bear such intrusions only upon a warrant supported by probable cause.

It would be difficult to conclude that the "mainstream" on this issue includes Judge Bork. Like all of us, he shows great concern that the ten guilty individuals not go free. Unfortunately, he shows no such concern to prevent the one innocent person from hanging.

But there's another, equally troubling dimension to his position on the Exclusionary Rule. I followed with interest as Judge Bork was questioned earlier in these hearings regarding the evolution of his thinking on sex discrimination issues under the Equal Protection Clause of the Fourteenth Amendment. He expressed support for including sex discrimination among the categories of discrimination properly subject to some level of heightened Equal Protection scrutiny. He was asked how he could reconcile this position with his support for the theory of original intent and the obvious fact that the drafters of the Fourteenth Amendment never had the vaguest notion of giving women rights equal to those of men. His response, as I recall, was to recognize that there was an inconsistency, but that the more expansive reading of the Fourteenth Amendment was justified because it was reasonable and has become "well-established" in law. To demonstrate his respect for the concept of stare decisis during these hearings, he has stated that, as a Justice, he would try not to meddle with "precedents which are simply too much a part of the fabric of society" to be overruled.

It is irrefutable that the Exclusionary Rule is at least as "well-established" as the notion of equal rights for women. It is based on constitutional doctrine going back to 1886, in Boyd v. United States, 116 U.S. 616, (holding that the Fourth and Fifth Amendments prohibit "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of his life"), and was actually established by the Supreme Court in 1914, in Weeks v. United States, 232 U.S. 383--six years before the Constitution was amended to give women the right to vote. It was extended to the States in 1961, in Mapp v. Ohio, 367 U.S. 643, a dozen years before even a plurality of the Supreme Court concluded that sex discrimination was deserving of any level of heightened scrutiny under the Fourteenth Amendment. Frontiero v. Richardson, 411 U.S. 677 (1973).

Why the discrepancy? If strict construction and original intent control one issue why not the other? I perceive an element of intellectual dishonesty here--a man less driven by principles than by his desire to become a Supreme Court Justice. A man who has spent decades establishing and polishing his credentials as a conservative's conservative, writing outspoken articles like the 1971 Indiana Law Review piece ("Neutral Principles and Some First Amendment Problems," 47 Ind.L.Rev. 1), taking extreme positions such as urging limiting the First Amendment to purely political speech, grooming himself for appointment by the next available conservative Republican President. A man who, having finally been nominated to the Supreme Court by the most conservative President in this century, and confronted with the need to please a broader constituency in the U.S. Senate in order to achieve confirmation, affects moderation. A man who does so selectively, calculating which gesture of moderation will soften more hearts. Where is the

political risk in standing tough on the rights of people accused of crime? Those who would challenge him could easily be dismissed as soft on crime, willing to let criminals go on "technicalities"--defined to include, evidently, constitutional protections.

Deference to Governmental Interests

In an area involving the confluence of the First Amendment and the criminal law, one of Judge Bork's majority opinions on the D.C. Circuit stands out, in Finzer v. Barry, 798 F.2d 1450 (1986). This is the case in which he upheld a District of Columbia statute (passed by Congress before the era of Home Rule) prohibiting demonstrations involving the display of signs tending to expose a foreign government to "public odium" within 500 feet of that country's embassy. In a scathing dissent, Judge Wald accused Judge Bork of "blindly deferring to the political branches and unquestioningly accepting their assertion of an ill-defined interest in protecting foreign embassies from annoyance and insult," and of attempting "to ignore well-settled constitutional principles by emphasizing what it perceives to be the trivial nature of the restrictions at issue."

It is this bias, this "blind deference" to virtually any asserted governmental interest, that should cause the members of the Senate very grave concern. As Senator Dole assured the Fraternal Order of Police, Judge Bork is "someone who will have the interests of law enforcement officers in mind when he makes a decision." Perhaps this is a fair and proper mindset for a Solicitor General--an advocate for the interests of the government, pushing the Court as far as it will go to lighten the government's load, tasked with making the best of cases botched by errant FBI agents, or overreaching federal prosecutors.

But the questions must be confronted: Has Judge Bork grown, has he changed, has he moderated anything about his views on criminal law issues since his days as Solicitor General? Has he offered any acknowledgement in the intervening decade, that the system as a whole draws its strength from its adversarial nature, that justice thrives on a fair balance between the forces of the accuser and the rights of the accused? Aside from token comments at these hearings about "fairness" in criminal trials, we see no signs of it.

The White House, in its memo on Judge Bork's opinions on criminal law issues, makes much of the fact that in his five years on the federal appeals bench, he has come down on the defendant's side in three cases--United States v. Brown, [cite] (1987); United States v. Foster, 783 F.2d 1087 (1986); and United States v. Vortis, 785 F.2d 327 (per curiam), cert. denied, 107 S.Ct. 148 (1986). Each of these cases presented the most

straightforward possible issues and resulted in unanimous opinions, none of them written by Judge Bork. They constitute a very slender thread from which to hang a characterization of him as a "mainstream" jurist.

Death Penalty

There is one final specific criminal law issue of significant importance in debating this nomination: the death penalty. And I would stress that the flaws in Judge Bork's thinking on this issue have nothing to do with whether one opposes or supports the death penalty itself. NACDL opposes the death penalty in all circumstances. I personally have always supported it in cases involving murder of a police officer, a corrections official, or a victim of an armed robbery. But we are in complete agreement that Judge Bork's approach is dangerously simplistic and intemperate.

He has stated, in the interview with the Free Congress Foundation I cited earlier, that the issue of the death penalty "is almost concluded by the fact that the death penalty is specifically referred to, and assumed to be an available penalty, in the Constitution itself. . . . It is a little hard to understand how a penalty that the Framers explicitly assumed to be available can somehow become unavailable because of the very Constitution that the Framers wrote."

This statement is premised upon a disturbing rejection of the entire concept that the Eighth Amendment must be read in light of "evolving standards of decency." Trop v. Dulles, 356 U.S. 86 (1956). Without those "evolving standards, as Justice Brennan pointed out in his concurrence in Furman v. Georgia, 408 U.S. 238 (1972), the reach of the Eighth Amendment would be frozen in the "standards of decency" of the late 18th century--a time when the practice of "ear-cropping" (cutting off or nailing back the offender's ears) was quite common, and when Congress had explicitly provided for a punishment of 39 lashes for larceny or receiving stolen goods, and one hour in the pillory for perjury. Id., at 263 n.6.

True, the death penalty is specifically mentioned in the Constitution. But can Judge Bork be seriously suggesting that this immunizes it from Eighth Amendment scrutiny? Let us assume that an uncontrovertable showing has been made that the death penalty is being "wantonly and freakishly" applied. When only one of 100 identically situated first-degree murderers is executed, would he deny that some "cruel and unusual" threshhold has been reached?

The Constitution also mentions a few other punishments specifically: the Fifth Amendment talks about persons being put

in jeopardy not only of life, but of "limb" as well. The Thirteenth Amendment abolishes slavery and involuntary servitude, "except as a punishment for crime whereof the party shall have been duly convicted." If some state passed legislation tomorrow authorizing ear-cropping for felonies, or castration for rape, or loss of a hand for theft, or slavery for anything else--that is, the selling of a human being as a chattel to a private slave-owner, who would have absolute control over the slave's life and liberty--would Judge Bork find it "a little hard to understand" how there might be an Eighth Amendment problem with such punishments in this Nation in 1987?

Let me make clear: I don't mean to suggest that Judge Bork supports slavery, or proposes amputation for petty criminals. The point is simply that his thinking on the death penalty is intellectually extraordinarily sloppy. Narrow application of the doctrines of strict construction and original intent obviously do not work on the death penalty, and for a federal appellate judge of his experience and stature to take such a position reflects a shockingly cavalier and irresponsible approach to one of the weightiest issues in all of jurisprudence, an attitude far beneath that expected of a candidate for one of the loftiest and most intellectually demanding legal jobs in the country.

Corporate Defendants

Against this backdrop of Judge Bork's views on the rights of individuals in confrontations with the government, it is interesting to examine his proclivities when it is a corporation that is involved in a confrontation with the government. From his appalling decision in the much-discussed American Cyanamid case (upholding OSHA's approval of the corporation's policy of requiring women to get sterilized if they wanted to keep their jobs), to the full range of his other business-government decisions, see "The Judicial Record of Judge Robert H. Bork," Public Citizen, August 1987, there is abundant evidence of the inconsistency of his application of the doctrine of judicial restraint, and his view that the rights of individuals occupy the lowest rung of the jurisprudential ladder of interests.

THE ARITHMETICAL THEORY OF INDIVIDUAL RIGHTS

We are deeply disturbed by the "redistribution of liberty" theory articulated by Judge Bork during these hearings, under which he holds that no liberty can be given to an individual without taking away a liberty from someone else. It is "pure arithmetic," he has said: "What a court adds to the rights of one, it takes away from the rights of others."

These statements reflect a fundamental insensitivity to th

world of individual rights guaranteed by the Constitution. It may be true that in civil law, in suits between two private parties, increasing the rights of one will restrict the rights of the other. But to suggest that something is "lost" by someone when a right of an individual against government oppression or intrusion is enforced, ignores the fundamental precept, embraced by nobody more passionately than the Framers, that the protection of individual liberties enriches the entire society. For example, when an individual's liberty to vote is enforced, what other person's liberty is diminished? The people who do not wish that individual--that woman or that Black--to have that right? When an individual's right to petition the government for redress of grievances is protected, who is the loser? Is it valid to suggest that a police officer has a "right" to conduct a search or seizure in violation of the Constitution, or that society has a "right" to have individuals convicted through the use of evidence so seized--a right that will be restricted by the enforcement of the individuals' rights? Does society lose something when an individual is afforded the right to an attorney in a criminal case, or is required to be informed of the existence of various constitutional rights before a custodial interrogation may begin?

The questions answer themselves. All of society is enriched by these individual rights. Even when the sanction of exclusion of evidence is involved, it has the overwhelming effect of successfully deterring the kind of misconduct which would lead to exclusion. If we are talking about the interests of society at large, it is beyond peradventure that society has a far stronger interest in protecting the liberties of each of its component individuals than in permitting the use of unconstitutionally obtained evidence.

It is not "pure arithmetic." It is specious mathematics, reflective of a dangerous blind spot in Judge Bork's vision of the Bill of Rights.

STARE DECISIS

During Judge Bork's testimony at these hearings, much has been said about his respect for the concept of stare decisis. He has taken pains to point out the various areas where he would not be inclined to meddle with holdings with which he might disagree, because, as I referenced earlier, he sees them as being so "well established" that overruling them would not be worth the disruption that it would cause. He points to decisions in the areas of the Commerce Clause, "legal tender," the Incorporation Clause, and some Equal Protection cases--"cases which are now part of our law," so that "it is simply too late for any judge to overrule them."

The problem is that there is no consistency in his application of this concept. If the test is longevity, including the long-term entrenchment of a legal theory and the accretion of other substantial theories and caselaw around it, how can he accept "legal tender" caselaw while rejecting caselaw on the Exclusionary Rule--an established institution in American criminal justice for more than 70 years, with an enormous body of caselaw grown up around it? How on earth does he reconcile his making a "longevity" exception for Commerce Clause caselaw, while denying such deference for privacy caselaw--Supreme Court decisions going back to the 1886 Boyd decision I mentioned earlier, and including the 1965 contraception decision in Griswold v. Connecticut, 381 U.S. 479--no youngster itself at the age of 22--and even Roe v. Wade, 410 U.S. 113 (1973)? These are cases that are at the very foundation of an enormous house of cards of privacy jurisprudence, universally accepted and taken for granted by every judge in the country and every person on the street. There can be no room for doubt that if the Court were to yank out one case such as Griswold, the entire house of protection for my daughters and granddaughters would come crashing down. It would take years, perhaps decades, for the state of individual rights in this country to emerge from disarray, while individuals and legislatures attempted to grapple with the sudden return to the law as it was in 1965.

Equally startling would be the disruptive effect of overruling the other lines of cases to which Judge Bork has directed his strongest criticism--the quarter-century-old "one person-one vote" rulings in Baker v. Carr, 369 U.S. 86 (1962); and Reynolds v. Sims, 377 U.S. 533 (1964); or the various equal protection rulings criticized in the Indiana Law Review article as "improper and intellectually empty," such as the 45-year old decision in Skinner v. Oklahoma, 316 U.S. 535.

CONCLUSION

And now I have come full circle. What explains Judge Bork's inconsistent deference to the rule of stare decisis? His selective view of judicial restraint? We would suggest that the only logical thread woven among these inconsistencies is an ideological one. There can be no escaping the conclusion that Judge Bork is a man driven to advance a conservative ideological agenda, a man who was appointed precisely because of his activist views, by a President who, in the closing months of his Administration, desperately needs to turn to the Court to advance a conservative agenda which he has been unable to get through Congress for six years. Thus, in "legal tender" caselaw, the rule of stare decisis suits him fine; but when we start talking about the individual right to privacy against governmental intrusions, or the rights of persons accused of crime, his rhetoric shifts into the mode of "judicial restraint" and

"original intent." The Supreme Court is no place for a person who comes to a case with a conclusion in hand, and dedicates his considerable legal skills to searching for an analytical approach to support it, working backwards from the conclusion, massaging the law to support the desired result.

We accordingly submit, Mr. Chairman, that Judge Bork is not qualified, by reason of lack of the level of judicial temperament and integrity which this body has historically demanded of nominees to the Supreme Court. We respectfully urge that the nomination be rejected.

Office of Public Affairs

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October 2, 1987 Statement of
ROBERT P. DUGAN, JR.
Director, Office of Public Affairs
NATIONAL ASSOCIATION OF EVANGELICALS
CONFIRMATION HEARING
on JUDGE ROBERT H. BORK
to the
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Mr. Chairman and Members of the Committee:

The National Association of Evangelicals (NAE) submits this written statement in support of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States. The NAE is an association of more than 50,000 churches from 72 denominations. We serve a constituency of some 15 million people through our various commissions and affiliates.

This testimony is a major step for NAE which, while it has frequently appeared before Congressional committees on religious liberty issues, has never before testified for or against confirmation of a Supreme Court Justice. Needless to say, we have little way of knowing how Judge Bork will vote on religious liberty issues or any other issue of interest to evangelicals. It is our commitment to the Constitution, and our concern about the constitutional role of the Supreme Court, which compels us to speak in support of his nomination.

At the outset, we want to say that we fully agree with this Committee that an inquiry into the judicial philosophy of a nominee to the Supreme Court is legitimate. Indeed, we believe it is essential in every case. The Constitution (Art. VI) requires Supreme Court Justices "to support this Constitution." That obligation, of course, is constitutionally prescribed for other state and federal

officials, including the members of this Committee, but is of special importance in the present context given the fact that the Supreme Court has the final say on matters of constitutional law.

The controversy over the nomination of Judge Bork should not be allowed to conceal the crucial issue. Do We the People still believe in the Constitution as a written covenant, binding upon us all and to be interpreted by the Court? Or do We the People believe the Constitution should be treated as a blank slate upon which judges may write their favored solution to every problem which comes before them? Speaking for evangelicals -- and I hope the American people -- we are not willing to surrender our birthright for a blank paper.

This controversial issue is not new. As President Thomas Jefferson wrote in an 1803 letter to Senator Wilson C. Nicholas of Virginia: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." Congress expressed the same concern for the Constitution some 180 years later when it passed legislation establishing the Bicentennial Commission. Congressional findings embodied in that legislation reveal a deep respect for the Constitution and its timeless principles of law. Congress found:

> the Constitution enunciates the limitations on government, the inalienable rights, and the timeless principles of individual liberty and responsibility, and equality before law, for the people of the United States of America, and
>
> the maintenance of the common principles that animate our Republic depends upon a knowledge and understanding of their roots and origins.

The necessity of preserving "the common principles that animate our Republic" was stressed by President Grover Cleveland in 1887 on the occasion of the Constitution's Centennial: "If the American people are true to their sacred trust, another centennial day will come, and millions yet unborn will inquire concerning our stewardship and the safety of their Constitution."

The Constitution cannot be considered safe if it can be manipulated by judicial fiat to embody in law a social agenda which failed to persuade a state legislature or the United States Congress. Tremendous pressures are being brought to bear by those who have a stake in preserving an activist Court. Opposition strategists are purposely distorting Judge Bork's fine record in a disinformation campaign calculated to play on the fears of those unfamiliar with the facts. As a result, large numbers of well meaning but misguided Americans have been led to oppose a man whose professional qualifications and character are above reproach. Those who put power above principle want the consitutional confirmation process to be merely a numbers game.

It speaks volumes about the opposing special interest groups that Bork's philosophy of judicial restraint poses a threat to their social agenda. Judge Bork's commitment to established principles of statutory and constitutional interpretation, for which he is noted in his judicial service, are the credentials which inspire their attack.

Because the national community of churches we represent looks to the Constitution as embodying a tradition of rights and obligations rooted in our history, we support Judge Bork. We support him as a jurist and constitutionalist who promises to be faithful to that tradition and to that history. The promise we see is grounded not only in his scholarly advocacy of constitutional principle, but in the record of his decisions, and in the most probing examination to which a judicial nominee has ever been subjected.

We fully agree with Judge Bork's philosophy and practice of judicial restraint. He has stated: "The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority's right to govern." Judicial review is only legitimate, he believes, if judges "interpret the [Constitution's] words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments."

Yet those whose most fervent wish is an activist Court characterize this rock-solid judicial philosophy as somehow "out of the mainstream." Abraham Lincoln said: "When judges cease to be judges, the people cease to be their own rulers." Was Lincoln out of the mainstream? It apparently is irrelevant to the proponents of judicial activism that Bork's view could not be more consistent with the constitutionally prescribed oath of office to support the Constitution.

As these unprecedented hearings have starkly revealed, there are those who endorse judicial activism and urge the courts to "do good" by discovering rights in the Constitution which, by any fair reading, are simply not there. It is they who are out of the mainstream -- not Jefferson, not Lincoln, and not Bork. As Alexander Hamilton said, the judiciary was to be "the least dangerous branch." Government by judiciary is not what the Founding Fathers had in mind.

That simple -- but crucial -- reality needs to be brought home to the American people who, as President Cleveland so eloquently recognized, are stewards of the Constitution. If We the People are to secure the blessings of liberty to ourselves and our posterity, if We the People are to live in a society that believes in the rule of law rather than the rule of men, then We the People must insist that judges pay more than lip service to the Constitution.

Judicial activists are fond of referring to the Constitution as a "Living Document," by which they mean a document constantly changing without benefit of amendment by the people. It is true that the Constitution is meant to be a "Living Document," but only in the sense that its enduring principles -- those core values -- are to be applied consistently over the years to changing facts and circumstances. The Constitution is a dead document if unelected judges are free to discover in its language what is plainly not there in order to strike down laws the people have enacted through their elected representatives.

To illustrate where such lack of judicial restraint leads, consider the opinions of some sitting Supreme Court Justices:

A minute of silence in public school classrooms, during which students can pray silently if they wish, is considered by five justices to be "unconstitutional." Yet it is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren, even if some choose to pray.

Legislative chaplains are considered by three justices to be "unconstitutional." Yet three days after Congress authorized the appointment of paid chaplains final agreement was reached on the language of the First Amendment.

Capital punishment is considered by two justices to be "unconstitutional." Yet capital punishment is recognized as lawful four times in the text of the Constitution.

Laws concerning religion, according to a majority of the Supreme Court, are "unconstitutional" unless enacted for a "secular purpose." Yet it is difficult to discern the secular purpose when in 1954 Congress added to the Pledge of Allegiance the words "under God."

Those professing a deep commitment to civil rights have falsely stigmatized Judge Bork as a racist, a sexist, and an opportunist willing to tailor his views in order to wear a justice's robe. The baseless charge that this decent and honest man favors the forced sterilization of women is symptomatic of their grotesque caricature of Bork's exemplary record.

What lies behind these false charges and overheated rhetoric is apparently the fear that if Judge Bork is confirmed, the proponents of a certain social agenda will have to come to the legislatures as the primary forum in which to advance their causes, not to a legislating court system. These inventors of new "rights" ignore the most precious right fundamental to representative democracy -- the "unalienable" right of the people to govern themselves through their elected representatives.

We have watched Judge Bork undergo the most searching scrutiny imaginable. He has patiently responded even to preposterous charges, with uncommon intelligence, honesty, and grace. The record reveals him to be a man of principle and of character, devoted to responsibilities as well as rights, to justice as well as liberty. Judge Bork's refreshing candor has been exemplary.

Former Chief Justice Warren E. Burger testified before the Senate Judiciary Committee: "If Judge Bork isn't in the mainstream, neither am I and neither have I been. I simply don't understand allegations that he is outside the mainstream." Justices John Paul Stephens and Byron R. White have also indicated Bork would be a welcome addition to the Supreme Court.

It will be tragic if Judge Robert H. Bork is not confirmed as the next Associate Justice of the Supreme Court.

NBA

Reply To:

September 29, 1987

Walter L. Sutton, Jr.
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Benjamin J. Pigott
General Counsel

Malcolm S. Robinson
Parliamentarian

John Crump
Executive Director

Senator Joseph Biden
Chairman of the Judiciary Committee
United States Senate
246 Dirksen Senate Office Building
Washington, D.C. 20001

Dear Senator Biden:

I am writing to clarify an implicit assumption which may arise from the testimony of Ms. Jewel LaFontant who testified in her personal capacity on Monday, September 28, 1987, in support of the confirmation of Judge Robert H. Bork, as Associate Justice to the United States Supreme Court. In her testimony Ms. LaFontant stated that her father, C. Francis Stradford, was one of the founders of the National Bar Association. It is true that Mr. Stradford was a founding member of the National Bar Association, a bar association whose membership consists overwhelming of minority attorneys.

We, however, want to make it clear that the 10,000 member National Bar Association is opposed to the confirmation of Judge Bork as an Associate Justice of the Supreme Court. Although Ms. LaFontant is a life member of the NBA, it is important to put to rest any concern that her views either implicitly or explicitly are shared by the Association. They are not.

The National Bar Association will be submitting for the record, testimony setting forth its reasons for opposing the confirmation of Judge Robert H. Bork.

Sincerely,

Walter L Sutton Jr

Walter L. Sutton, Jr.
President, NBA

THE NATIONAL BLACK CAUCUS OF STATE LEGISLATORS

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9/87

TESTIMONY

OPPOSING JUDGE ROBERT H. BORK'S NOMINATION TO THE SUPREME COURT

GOOD MORNING MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. I WOULD LIKE TO TAKE THIS OPPORTUNITY TO THANK YOU FOR HAVING ME APPEAR BEFORE THIS COMMITTEE TO EXPRESS THE VIEWS OF MYSELF AND MEMBERS OF THE NATIONAL BLACK CAUCUS OF STATE LEGISLATORS.

FOR THE RECORD, I AM STATE REPRESENTATIVE DAVID P. RICHARDSON, JR., PRESIDENT OF THE NATIONAL BLACK CAUCUS OF STATE LEGISLATORS AND CHAIRMAN OF THE HOUSE HEALTH AND WELFARE COMMITTEE IN THE GENERAL ASSEMBLY OF PENNSYLVANIA.

MR. CHAIRMAN, I AND MANY OF MY COLLEAGUES OPPOSE NOMINATION AND POSSIBLE CONFIRMATION OF JUDGE ROBERT H. BORK. OUR OPPOSITION COMES AFTER MANY HOURS OF REVIEW OF JUDGE BORK'S RECORD AS A MEMBER OF THE UNITED STATES COURT OF APPEAL FOR THE DISTRICT OF COLUMBIA CIRCUIT AND

THE OPINIONS HE HAS WRITTEN AS A RESULT OF HIS SERVING ON THE D. C. CIRCUIT FOR OVER FIVE YEARS.

FIRST, BECAUSE MANY CONSTITUTIONAL LAW CASES INVOLVE ISSUES OF GRAVE IMPORTANCE TO THE CONSTITUENTS OF OUR ORGANIZATION (NBCSL) AND THE MEMBERS AS WELL, IT SEEMED APPROPRIATE TO HAVE SOME PROSPECTIVE ON HOW JUDGE BORK CARRIED OUT HIS DUTIES. THE FIRST THING I DISCOVERED IN MY REVIEW IS THAT JUDGE BORK MAY BE MORE OF AN ADVOCATE OF "JUDICIAL JUGGLING" THAN OF "JUDICIAL RESTRAINT". I SAY THIS BECAUSE IN THE LIMITED NUMBER OF CONSTITUTIONAL CASES PARTICIPATED IN BY BORK REFLECTS THAT ON ONE HAND HE EXERCISES JUDICIAL RESTRAINT WHEN INDIVIDUALS HAVE PETITIONED THE COURT TO PROHIBIT THE FEDERAL GOVERNMENT INTERFERENCE WITH THEIR ACTIVITIES, WHILE ON THE OTHER HE HAS BEEN MORE THAN WILLING TO FIND NEW CONSTITUTIONAL GUARANTEES WHEN BUSINESS HAS COMPLAINED ABOUT GOVERNMENTAL INTRUSION.

ANOTHER AREA OF PRIMARY CONCERN TO US IS THE CONCEPT THAT JUDGE BORK HAS THAT SUPREME COURT JUSTICES ARE NOT OBLIGATED TO UPHOLD PRECEDENT ON CONSTITUTIONAL QUESTIONS AND THAT, AS HE STATES IN A TALK WITH JUDGE ROBERT H. BORK, A DISTRICT LAWYER 29,32 (MAY/JUNE 1985), "THE COURT OUGHT TO BE ALWAYS OPEN TO RETHINK CONSTITUTIONAL PROBLEMS". I AM QUITE SURE

THAT THE MEMBERS OF THIS COMMITTEE CAN UNDERSTAND OUR CONCERN ABOUT THIS KIND OF THINKING BY A POTENTIAL MEMBER OF THE SUPREME COURT.

THIRDLY, WE ARE CONCERNED WITH THE WRITTEN AND VERBAL OPINIONS THAT JUDGE BORK HAS ESPOUSED REGARDING INDIVIDUAL RIGHTS. AS WE UNDERSTAND IT, THE RIGHT TO PRIVACY HAS ALWAYS BEEN A CONTROVERSIAL ISSUE. IN HIS WRITING, JUDGE BORK CLEARLY INDICATES THAT HE HAS A PROBLEM WITH THE DECISION RENDERED IN THE GRISWALD v. CONNECTICUT CASE. PERSONALLY, MR. CHAIRMAN, I AM VERY CONCERNED THAT IF MR. BORK WERE TO BECOME A SUPREME COURT JUSTICE HE MAY MOVE TO REVISIT THE ROE v. WADE DECISION. THIS IN MY MIND IS LIKE INVITING THE FOX INTO THE HEN HOUSE AND THEN WONDERING WHY THE CHICKENS ARE MAKING ALL THAT NOISE.

AS CHAIRMAN OF THE HOUSE HEALTH AND WELFARE COMMITTEE FOR THE COMMONWEALTH OF PENNSYLVANIA, I AM TRULY CONCERNED WITH MR. BORK'S APPARENT LACK OF COMPASSION AND HIS USE OF HIS PHILOSOPHICAL APPROACH TO JUDICIAL RESTRAINTS IN THE CASE OF WILLIAMS v. BARRY WHERE THE COURT HAD TO DETERMINE THE EXTENT TO WHICH THE CONSTITUTION REQUIRES THAT DUE PROCESS BE ACCORDED HOMELESS MEN BEFORE THE DISTRICT OF COLUMBIA COULD CLOSE THEIR SHELTER. JUDGE BORK'S OPINION ADDRESSED THE ISSUE OF WHETHER

THE HOMELESS MEN HAD ANY CONSTITUTIONAL PROTECTION FROM ARBITRARY GOVERNMENT ACTION IN THE FORM OF DUE PROCESS RIGHTS. IT IS MY OPINION, AND I AM CERTAIN THAT MY COLLEAGUES WOULD CONCUR, THAT THE CONSTITUTIONAL RIGHTS TO DUE PROCESS OF MEN WITH OR WITHOUT A HOME ARE IN FACT COVERED BY THE CONSTITUTION.

I ALSO FIND SOMETHING OF A CONTRADICTION IN JUDGE BORK'S STATEMENTS TO THE SENATE JUDICIARY COMMITTEE. AS REPORTED IN THE WEDNESDAY, SEPTEMBER 16, 1987 EDITION OF THE WASHINGTON POST, JUDGE BORK, WHEN QUESTIONED AS TO WHETHER HE WOULD ATTEMPT TO OVERTURN PRIOR COURT RULINGS ON CIVIL RIGHTS AND CIVIL LIBERTIES SAID, "A JUDGE MUST GIVE GREAT RESPECT TO PRECEDENT". HE MADE THIS STATEMENT IN SPITE OF HIS EARLIER STATEMENT TO THE CONTRARY, WHICH I POINTED OUT EARLIER IN MY TESTIMONY.

IN CLOSING, I CAN ONLY STRONGLY REITERATE AND SUPPORT WHAT HAS BEEN SAID BY MANY WHO QUESTION MR. BORK'S ROLE IN THE FIRING OF WATERGATE SPECIAL PROSECUTOR ARCHIBALD COX. IT IS MY OPINION THAT THIS FIRING WAS TRIGGERED BY THE FACT THAT MR. COX HAD OBTAINED THE RIGHT TO SUBPOENA TAPES PRESIDENT NIXON HAD IN HIS POSSESSION. IF MR. BORK FIRED MR. COX TO PROTECT THOSE IN OFFICE, ONE MUST QUESTION HIS ETHICS AND HIS USE OF

JUDICIAL RESTRAINT. COUPLE THIS WITH THE FACT THAT HIS ACCOUNT OF THE SATURDAY NIGHT MASSACRE HAVE BEEN CHARACTERIZED AS LESS THAN CANDID; I FEEL WE HAVE AT LEAST THE BEGINNING OF A CASE AGAINST MR. BORK'S RECOMMENDATION OR CONFIRMATION.

I TRULY BELIEVE THAT MR. BORK POSSESSES A RIGHT-WING ACTIVIST IDEOLOGY. HE'S EAGER AND READY TO OVERRULE MANY DECISIONS MADE BY THE SUPREME COURT WHICH ARE OF THE UTMOST IMPORTANCE TO THE CONSTITUENTS OF THE NATIONAL BLACK CAUCUS OF STATE LEGISLATORS. THIS HAS BEEN CLEARLY DEMONSTRATED TO THIS COMMITTEE BY MR. BORK'S CONTROVERSIAL STANCE ON ABORTION, AFFIRMATIVE ACTION, THE RIGHT TO PRIVACY AND ONE-MAN, ONE-VOTE ISSUES. I FURTHER BELIEVE THAT THE EVIDENCE HAS SHOWN MR. BORK TO BE INTELLIGENT, BUT AN IDEOLOGUE, PRINCIPLED, BUT PREJUDICED, COMPETENT, BUT CLOSED MINDED. FOR THESE REASONS, I STRONGLY, AS STRONGLY AS POSSIBLE, OPPOSE HIS NOMINATION, RECOMMENDATION OR CONFIRMATION.

ncwge National Coalition for Women and Girls in Education

c/o DHN, 1411 K Street, NW, 9th Floor,
Washington, DC 20005, (202) 628-6767

September 25, 1987

The Honorable Joseph Biden
United States Senate
Washington, DC 20510

Dear Senator Biden:

I am writing on behalf of the National Coalition for Women and Girls in Education and its undersigned members to express our opposition to Robert Bork's nomination to the position of Associate Justice of the Supreme Court of the United States. The National Coalition for Women and Girls in Education includes 60 national organizations, representing approximately two million individual members. For nearly fifteen years, the Coalition has actively worked to achieve equal educational opportunities for women and girls.

The Coalition is deeply concerned about the devastating impact that Judge Bork's extremist and activist views will have on a broad range of individual rights long believed to be safeguarded by the Constitution. In his judicial and academic writings and statements, Judge Bork has demonstrated a consistent and virtually unprecedented hostility to numerous Supreme Court decisions which form the basic guarantee of individual liberties in our nation. There is no question that, if elevated to the Supreme Court, Judge Bork will act on his oft-stated belief that Supreme Court justices should disregard precedent if it conflicts with their view of proper constitutional interpretation. When combined with his radically narrow views regarding the substance of many key constitutional protections, we are left with the undeniable portrait of a judge dedicated to dramatically limiting the fundamental rights of all citizens.

The Coalition is particularly concerned with the threat Judge Bork poses to women's legal rights, including the rights of the girls and young women whose interests we represent. Over the past fifteen years, the country has witnessed a dramatic expansion of women's legal status. By way of example, the equal protection clause is now interpreted to provide a meaningful

guarantee against government-sponsored sex discrimination, a matter of great importance in education where government plays such a critical role. All Americans have the right to determine whether and when to bear children. Family life is effectively protected from governmental interference. Sexual harassment on the job is prohibited. And affirmative action is available, in appropriate cases, to remedy historic discrimination. While additional progress remains to be accomplished, the girls and young women growing up today have a range of opportunities before them -- guaranteed by the law of the land -- unimagined by their mothers.

Judge Bork's well-established and extensively documented views, however, put all of these gains into great jeopardy. Indeed, his hostility to each of the rights articulated above threatens to eliminate the promise now extended to our girls and young women. Judge Bork disparages familial privacy rights, he would reverse the extension of heightened equal protection guarantees to women, and he would interpret statutes prohibiting sex-based discrimination as narrowly as possible.

These concerns are not speculative; they are squarely based on Judge Bork's record. Further, they are not simply theoretical in nature. The impact of the application of Judge Bork's views will be profound. For example, one direct -- and very concrete -- result of Judge Bork's view that women have no special status under equal protection will be to allow school districts broad leeway in instituting sex-discriminatory education programs. The Coalition has long worked to end such practices but sex discrimination remains a serious problem in areas ranging from vocational education to special math, science and computer programs to physical education. Without the protections offered by the Fourteenth Amendment, girls and young women will lose their most potent legal weapon in the fight against the sex-stereotyping which has drastically limited their opportunities.

In the same vein, the impact of Judge Bork's position regarding sex discrimination in employment is neither theoretical nor speculative. He is clearly on record, through his dissenting opinion in Vinson v. Taylor, 753 F.2d 141, rehearing denied, 760 F.2d 1330 (D.C. Cir. 1985), aff'd sub nom. Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986), that sexual harassment is likely not to be sex discrimination at all. In that opinion, in the event that his basic view did not prevail, he proposed a set of standards which would make sexual harassment virtually unprovable. His position was subsequently repudiated by a unanimous Supreme Court in a decision written by Chief Justice Rehnquist.

Similarly, Judge Bork would enable employers to dictate the parameters of female employees' reproductive freedoms. In Oil,

Chemical & Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir 1984), he upheld an employer's "fetus protection policy" which required women of child bearing age to choose between sterilization or losing their jobs. In his article, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971), Judge Bork criticized the extension of equal protection guarantees and privacy-based rights to pregnant workers.

Finally, Judge Bork is on record in opposition to remedial affirmative action. He would thus severely limit women's access to the jobs, promotions and better pay from which they have been barred by historic discrimination. And these are only brief examples of the far-reaching and devastating impact Judge Bork's confirmation would have for the legal rights of women and girls.

The confirmation of Judge Bork presents a clear and present danger to the basic legal rights of women. The National Coalition for Women and Girls in Education believes, based on a careful examination of his record, that Judge Bork would turn the clock back to the day when women were unprotected by our laws. This is unacceptable. We call on the Senate to reject his nomination.

Sincerely,

Jill Miller

Jill Miller
Chairperson

On Behalf of the Following Organizations:

American Association of University Professors
American Association of University Women
Displaced Homemakers Network
Federation of Organizations for Professional Women
National Association of Girls and Women in Sport
National Association for Women Deans, Administrators and Counselors
National Coalition for Sex Equity in Education
National Council of Negro Women
National Education Association
National Women's Law Center
National Women's Political Caucus
Project on Equal Education Rights of the NOW Legal Defense and Education Fund
Wider Opportunities for Women
Women Educators

National Conference of Black Lawyers
126 WEST 119 STREET • NEW YORK, N.Y. 10026 • (212) 864-4000

October 5, 1987

The Honorable Joseph R. Biden Jr.
U.S. Senate
Washington, D.C. 20510

Re: Testimony in Opposition to the Nomination of Judge Bork to the Supreme Court

Dear Senator Biden:

The National Conference of Black Lawyers submits the enclosed testimony for inclusion in the record in opposition to the Bork nomination. Thank you for accepting our written testimony.

Sincerely,

Wilhelm Joseph
Interim Director
National Co-Chair

Adjoa A. Aiyetoro
National Co-Chair

Enclosure

The National Conference of Black Lawyers and Medgar Evers College Center for Law and Social Justice welcome this opportunity to advise the Senate Judiciary Committee on our opposition to the nomination of Judge Robert H. Bork to the Supreme Court of the United States. We oppose his appointment because an examination of Bork's record demonstrates that he does not view the rights of minorities, the rights of women, the rights of the poor, the rights of criminal defendants and the rights of all citizens to equal protection, privacy and access to the courts as worthy of the degree of constitutional protection that the National Conference of Black Lawyers and the Medgar Evers College Center for Law and Social Justice have fought to secure. His position on each of these issues fully establishes his unsuitabilty to serve as an Associate Justice of the Supreme Court and requires rejection of his nomination.

The National Conference of Black Lawyers ("NCBL") is a non-profit legal organization of lawyers, judges and legal workers founded in 1968 at the height of the civil rights movement. NCBL provides a broad range of legal support work on issues that impact on the poor and people of color. The organization actively participates in the courtroom and political struggles which have led to many landmark decisions and legislation recognizing the civil rights of racial minorities. NCBL submitted amicus curiae briefs in such cases as Fullilove v. Klutznick[1], Wygant v. Jackson Board of Education[2] and Cleavinger v. Saxner.[3] NCBL also helped to develop legal arguments and guidelines to support affirmative action for racial minorities and women.

The Medgar Evers College Center for Law and Social Justice ("MEC Center") is a legal research and advocacy institution established in 1985. The MEC Center provides legal assistance and other services to community based organizations on matters of civil and human rights which have implications for the community as a whole. The MEC Center litigates a variety of civil cases involving constitutional issues such as the right to privacy.

If Robert Bork succeeds in becoming a Justice to the Supreme Court, the constitutional rights of individuals and the work that both organizations engage in will be in jeopardy.

Before reviewing Bork's record on the substantive issues already

mentioned, it is important to understand his views on constitutional interpretation-- the major task of the Supreme Court. In interpreting the Constitution, Bork has promoted the theory of so-called "neutral principles."[4] Bork's theory condemns alleged resort to moral principles in resolving constitutional questions. He contends that, by doing so, judges base decisions on their own values and personal beliefs, rather than on the original intent of the Framers. As a consequence, he contends that a judge has no way, consistent with democracy and neutral principles, to decide when equality is more important than liberty based upon constitutional language.[5] He therefore characterizes many Supreme Court decisions as without a sufficient constitutional justification. According to Bork, these decisions "cannot be squared with the presuppositions of a democratic society."[6]

NCBL and MEC Center fear that if appointed, Bork will advocate for the application of his "neutral principles" theory to the cases which come before the Court. His so-called neutral approach to judicial review is not neutral in its effect; indeed, the results of such an extreme literal interpretation of the Constitution will be pernicious to everyone but those who comprise the majority in this country. Clearly the advocacy of such views alone renders Bork a poor choice to serve as a final arbiter of justice for those who must ultimately depend on the Supreme Court for the promises and protections of the Bill of Rights.

Bork uses his "neutral principles" theory to buttress his extreme positions on constitutional issues and to reject the reasoning of many Supreme court decisions. For instance, it is a well-established constitutional doctrine that most provisions of the Bill of Rights are extended to the states through the due process clause of the fourteenth amendment.[7] The application of this doctrine has lead the Supreme Court to bar judicial enforcement of racially restrictive covenants;[8] provide heightened protection to children born out of wedlock;[9] affirm Congress' authority to remedy de facto discrimination[10]; and end Gestapo-like police tactics used by state law enforcement officials against citizens suspected and accused of crimes.[11] Bork has disagreed with these decisions and has sought to limit the scope of the fourteenth amendment.[12]

Another example of how this theory has been applied by Bork is found in his analysis of statutes and Supreme Court decisions pertaining to the enforcement of civil rights, so long denied the Black citizens of this country. Bork openly opposed the Interstate Public Accomodations Act of 1964, which forbides racial discrimination by owners of motels, hotels, restaurants and other places of public accomodation engaged in interstate commerce. In 1963, Bork wrote in the New Republic that the Act would deny the owners of business establishments "personal liberty" by requiring them to serve persons of all races.[13]

Not only does this argument ignore the fact that the enforcement of this statute is consistent with the constitutional principles of equal protection; it also recalls the days when "a black man ha(d) no rights that a white man (was) bound to respect." Dred Scott v. Sandford.[14]

In placing more importance on the "liberty" of the individual to practice invidious discrimination than on the right of Black citizens to equal protection under the law, Bork has, contrary to his own theory, made a value judgment obstensibly based on his own set of moral principles.

A third example of Bork's theory in practice is his discussion of Shelley v. Kramer.[15] Shelley holds that a court may not enforce a private agreement not to sell real property to members of racial minority groups. As a result, private agreements to discriminate through restrictive covenants became useless because they were legally unenforceable. Again in 1968, Bork disagreed with the decision because of his position that judges should not decide when equality is more important than liberty. According to Bork, if the fourteenth amendment does not yield a dividing line between equality and liberty, the judge is to reject the equality claim of the excluded minority group member in favor of the majority.[16]

It is important to keep in mind that "(A)t a time when black and white opponents of segregation and racial discrimination were literally risking their lives to extend the constitutional guarantee of equal protection to all citizens regardless of race, Judge Bork was concerned about the rights and freedoms of those who wished to maintain segregation".[17] He supported segregation during a period in American history when Jim Crow was in its death throes, taking with it the lives of young black children in church bombings and civil rights

workers by lynch mobs. Bork clearly had no concern for the civil and human rights of these citizens if it meant depriving the majority of its "liberty" to segregate and discriminate. It is preposterous for him to claim that such a position is "neutral" in light of the devasting consequences of segregation in this country.

Presumably underlying Bork's application of his "neutral principles" theory to cases involving the rights of blacks and women is an inherent belief in their inferiority to white males. He readily and unabashedly questions the basic assumption of affirmative action that by obliterating societal discrimination, racial minorities and women will achieve a level of equality proportionate to their population. Instead, Bork postulates that affirmative action,

> may be reckless in the chances it takes with the future of this society. The policy of affirmative action...assumes that, if there is no societal discrimination every race and ethnic group would achieve proportional representation in every field. There is no reason to suppose such thing to be true. The world does not work that way. Group cultures differ and that leads to differing interest and differing talents.18

This stereotypic view supports Bork's arguments against affirmative action and for majority rule. It ignores, however the history of this country's denial of equal opportunity to individuals based on race and sex and exposes a deep insensitivity to racial minorities and women. Fortunately, the Supreme Court has rejected this narrow view of the Constitution and civil rights laws. However, if left to Bork, "...women would be forced into back-alley abortions, Blacks would sit at segregated lunch counters, and rogue police would break down citizens' doors in midnight raids."[19]

Bork not only rejects the most basic applications of due process and equal protection; his record shows that he has consistently denied access to the courts to individuals seeking relief from a broad range of constitutional and statutory violations. He has urged Congress to cut back access to federal courts.[20] He has argued the doctrines of standing, justiciability and immunity as grounds in dissenting opinions to deny numerous plaintiffs their day in court.[21] Given his role as a potential "swing vote" on the Supreme Court, his refusal to hear a civil rights or liberties claim either on the merits or on jurisdictional grounds has the same effect: individuals are left

without a legal means to redress violations of their constitutional rights.

Moreover, a study of split decisions involving Bork demonstrates a bias in determining whose rights should be adjudicated and how. In regulatory cases where business interests challenged a government agency, Bork voted against the regulatory agency 100% of the time in close cases. In regulatory cases where consumers, public interest or other citizens' organizations challenged a government agency, Bork voted against the consumer 90% of the time.[22] This pattern of automatic pro-big business, anti-citizen votes forebodes a bleak future for the fair and equal treatment of all citizens under the law if Bork's nomination is confirmed.

Finally, we urge this Committee to consider the grave implications of Bork's extreme deference to the executive branch. Each branch of government provides checks and balances to the other which prevents the executive branch from ruling as a monarchy. This system protects us in both domestic and foreign affairs. The Supreme Court is often faced with resolving many of the issues which go to the heart of the constitutional system of separation of powers: whether the President's actions are limited by law and subject to the will of the people.

The Vietnam War and the Watergate affair raised constitutional questions about the power of Congress and the federal courts to limit the executive branch. During these times, Bork took the position that warrantless wiretapping is constitutional to advance the President's role in foreign affairs.[23] He defended President Nixon's decision to bomb Cambodia, insisting that Congress had no power to limit the Executive's discretion to stage the attack.[24]

Judge Bork's deference to the Executive, at the expense of Congress, is also evident in his refusal to find federal jurisdiction over claims based on violations of international human rights, despite a statutory enactment providing for such jurisdiction.[25] Moreover, his views on Executive power have led him to shield executive action from the checks and balances of public scrutiny under the Freedom of Information Act.[26]

Most recently, the Iran/Contragate affair and the reflagging of Kuwaiti vessels in the Persian Gulf have and will raise similar constitutional questions pertaining to separation of powers. If Bork is a member of the Supreme Court, it is clear he will urge that complete deference be given to the executive branch in matters of foreign affairs. This position cuts against the grain of the established balance of power. Bork has clearly set forth his views of the plenary power of the executive branch to conduct foreign affairs, unfettered by legislative or judicial constraint.[27] The rights of the people, protected by the legislature and the courts, would fair poorly in Bork's world of Executive supremacy.

We are wary of Bork's assertion that he has had a change of heart regarding some of his extreme views. His record reflects a clear insensitivity to the rights of the individual, while giving deference to the executive branch and big business. This is not the kind of man who should hold one of the highest positions in the land. Our Constitution is a living document which has been successfully adapted to guarentee equal protection and treatment under the laws. Robert Bork's narrow vision of the Constitution especially threatens the rights of individuals without power who have looked to the Supreme Court for protection. The citizens of this country deserve better. For all these reasons, we urge the Senate Judiciary Committee to reject the nomination of Robert H. Bork as an Associate Justice to the United States Supreme Court.

Footnotes

1 448 U.S. 448 (1980).

2 476 U.S.__ (1986).

3 __U.S.__, 106 S.Ct. 496 (1985)

4 Bork, "Neutral Principles and Some First Amendment Problems", 47 Indiana Law Journal 9 (1971).

5 Id. at 16.

6 Id.

7 See e.g., Duncan v. Louisiana, 391 U.S. 145,148(1968).

8 Shelley v. Kramer, 334 U.S. 1 (1948).

9 Weber v. Aetna Casualty & Surety Co., 406 U.S.164(1972); Levy v. Louisiana, 391 U.S. 68 (1968).

10 City of Rome v. United States, 446 U.S. 156 (1980).

11 See e.g.,Wolf v. Colorado,338 U.S. 28 (1949), Mapp v. Ohio, 367 U.S. 643 (1961)(fourth amendment prohibition against search and seizure applied to the states); Malloy v. Hogan, 378 U.S. 1(1964), Benton v. Maryland, 395 U.S. 789 (1969)(fifth amendment applied to prevent double jeopardy and self-incrimination); Gideon v. Wainright, 372 U.S. 335 (1963)(right to counsel under sixth amendment); Robinson v. California, 370 U.S. 660 (1962)(eight amendment prohibition against cruel and unusal punishment applied to the states).

12 Bork,"Neutral Principles", supra, at 11,12; Equal Employment Opportunities Act of 1972: Hearings on S.3395. Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare,92nd Cong.,2d Sess.1343(1972).1

13 Bork, "Civil Rights -- A Challenge" The New Republic, August 31, 1963.

14 19 Howard 393 (1857).

15 Shelley v. Kramer, supra, at n.8.

16 Bork, "Neutral Principles", supra, n.5.

17 "Employment Discrimination, Equal Protection and Affirmative Action",p.15 Bork Report Nation Institute (1987).

18 Bork, "A Murky Future", Regulation, Sept./Oct. 1978 at 38.

19 Senator Edward M. Kennedy, Senate Judiciary Comm. September,1987.

20 Hearings on S.1847 Before the Subcomms. on Courts and Agency Admin. of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. at 9,13-14(1982).

21 See e.g., Barnes v. Kline, 759 F.2d 21(D.C.Cir.1984); Brown v. United States, 742 F.2d 1498 (D.C.Cir.1984).

22 Address by Attorney General Robert Abrams, New York Coalition Against the Bork Appointment, p.3. (September 10, 1987).

23 Confirmation of Federal Judges, Hearings Before the Committee on the Judiciary, U.S.Senate,97th Cong. 2d Sess. at 134,138 (March 11,24,31, 1982).

24 Bork, Comments on Legality of United States Action in Cambodia, 65 Am. J. Int'l L. at 79(1971).

25 See McGeHee v. C.I.A.,697 F.2d 1095 (D.C.Cir.1983) (dissenting)(no evidence of bad faith despite dilatory and evasive behavior by agency).

27 Abourezk v. Reagan,785 F.2d 1043,1062(D.C.Cir. 1986) (dissenting)(power over foreign affairs is "fundamentally executive in nature").

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.

THE WASHINGTON OFFICE
110 Maryland Avenue, N.E., Washington, D.C. 20002 (202) LI4-2350
Philip R. Cousin, President Arie R. Brouwer, General Secretary

James A. Hamilton
Director

Mary Anderson Cooper
Assistant Director

October 1, 1987

The Honorable Joseph R. Biden, Jr.
United States Senate
Washington, DC 20510

Dear Senator Biden:

Enclosed is a resolution adopted by the Executive Committee of the National Council of Churches opposing the confirmation of Judge Robert H. Bork as an Associate Justice of the U.S. Supreme Court. The National Council of Churches is the major expression of the ecumenical movement in the United States through which thirty-two communions--Protestant, Orthodox and Anglican church bodies with a combined membership of 40 million Christians--make a common witness to their faith.

As a member of the Senate Judiciary Committee, you may also be interested in the enclosed report on the nomination prepared by Dean M. Kelley, the Council's Director for Religious and Civil Liberty, and sent to member of the NCC Executive Committee in advance of their consideration of the resolution opposing Judge Bork's confirmation. In his report, Rev. Kelley reviews specifically the opinions and statements of Judge Bork which might reasonably be expected to affect issues regarding which the NCC has taken policy positions.

We had been hopeful that Rev. Kelley might have the opportunity to testify before the Committee concluded its confirmation Hearings. Since that was not possible, we share with you now the resolution together with the research report upon which it was based.

Thank you for your consideration of our views.

Sincerely yours,

Philip R. Cousin
Bishop Philip R. Cousin
President

Arie R. Brouwer
Dr. Arie R. Brouwer
General Secretary

Enclosures

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.

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Director

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Assistant Director

October 1, 1987

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Since it was not possible for a witness representing the National Council of Churches to testify at the just-concluded Hearings on the confirmation of Judge Robert Bork to become Associate Justice of the U.S. Supreme Court, may we request that the enclosed material be included in the printed record of the Hearings.

Enclosed is a copy of the resolution opposing the confirmation of Judge Bork as adopted by the Council's Executive Committee at its meeting in Atlanta, Georgia, along with its appendix "Summary of the Statements and Opinions of Judge Robert H. Bork" upon which the Executive Committee based its resolution.

In addition, we are enclosing a staff report on the nomination prepared by Dean M. Kelley, the Council's Director for Religious and Civil Liberty, and the person whom your Committee staff was interested in working into the Hearing schedule. This report, which was sent to Executive Committee members in advance of their consideration of the resolution opposing Judge Bork's confirmation, reviews specifically the opinions and statements of Judge Bork which might reasonably be expected to affect issues on which the NCC has taken policy positions through the years.

Thank you for your consideration of our request.

Sincerely,

James A. Hamilton

Enclosures

Resolution Opposing the Nomination of Judge Robert H. Bork to the Supreme Court of the United States

Adopted by the Executive Committee of the
National Council of the Churches of Christ in the U.S.A.
Meeting in Atlanta, Georgia, September 18, 1987

In 1970 the General Board of the National Council of the Churches of Christ in the U.S.A. adopted a Resolution on Federal Judicial Appointments which urged:

> the President of the United States in exercising the power of nomination, and the U.S. Senate in exercising the power of confirmation,...to appoint and confirm only those persons whose declared and demonstrated commitments, statements, and opinions give reasonable assurance that they will advance the effective protection of the full rights of all citizens.

In the light of this understanding, the Executive Committee of the National Council of Churches has reviewed the nominee's statements and opinions giving consideration both to his views on specific issues and to his underlying judicial philosophy. That review has failed to provide "reasonable assurance that [the nominee] will advance the effective protection of the full rights of all citizens", which the Council called for in its 1970 action and which the Council has pursued over the years in part by filing nearly 100 briefs *amicus curiae* in cases where the Council judged "the effective protection of the full rights of all citizens" to be at stake. Since a review of Judge Bork's opinions on specific issues and his basic judicial philosophy have shown that his appointment could predictably have the effect of contributing to the denial of access of such causes to the federal courts in the future, the following resolution is presented in opposition to his nomination to the Supreme Court.

Therefore, be it resolved that the Executive Committee of the National Council of the Churches of Christ in the United States of America record its opposition to the confirmation of Robert H. Bork as an Associate Justice of the Supreme Court of the United States, and further:

That the President and the General Secretary of the National Council of Churches communicate this opposition to the Senate Judiciary Committee, and the members of the Senate.

Appendix

Summary of the Statements and Opinions of Judge Robert H.Bork

A. Views on Specific Issues

1. Judge Bork has been resistant to measures designed to remedy **racial discrimination and to protect civil rights:**

   a. He criticized Harper v. Virginia Board of Elections, which struck down a poll tax alleged to have restricted voting by Black citizens of Virginia (1973 confirmation hearings);

   b. He testified in favor of efforts by the Nixon Administration to restrict remedies the Supreme Court had held were necessary to correct school segregation; 500 law professors contended the Nixon policies were unconstitutional; Bork was one of only two law professors testifying in favor (1972).

   c. As Solicitor General, he opposed school desegregation remedies, once being overruled by Attorney General Edward Levi when he tried to bring the Boston School case to the Supreme Court to curtail the remedy ordered by lower federal courts (1976).

   d. As Solicitor General, he opposed in the Supreme Court fair housing remedies for low-income Black citizens (Hill v. Gautreaux, 1976).

   e. He criticized the Supreme court's decision in Bakke v. Board of Regents permitting limited use of affirmative action to correct racial discrimination in medical school admissions (writing in the Wall Street Journal, July 21, 1978).

2. He condemned the Supreme Court's **one person, one vote** rulings that corrected the long-standing malapportionment of legislatures permitting rural areas to dominate urban populations (1973 confirmation hearings). (NCC supported the principle of one person, one vote in its policy statement EQUAL REPRESENTATION IS A RIGHT OF CITIZENSHIP, 1965.)

3. He rejected the view that **capital punishment** has become -- or ever could become -- "cruel and unusual punishment" (Interview published in Judicial Notice, June, 1986). (NCC entered amicus briefs in opposition to the death penalty in four cases on the basis of its policy statement ABOLITION OF THE DEATH PENALTY, 1968.)

4. He contended that the **religion clauses of the First Amendment** have both been over-extended by the Supreme Court and should be cut back. "A relaxation of current rigidly secularist doctrine would...permit

some sensible things to be done....(such as) the reintroduction of some religion into public schools and some greater religious symbolism in our public life." He also contended that the Establishment Clause was intended to prevent only the establishment of a national church or the preference of one religion over another (although the First Congress rejected three proposals which were thus narrowly worded) (Speeches at University of Chicago, 1984, Brookings Institution, 1985).

5. He joined a decision written by Judge Scalia upholding dismissal of a challenge by churches and other groups (in which NCC was a co-plaintiff) to President Reagan's Executive Order No. 12333; they challenged it in part because it would permit U.S intelligence agencies to use clergy and missionaries for intelligence-gathering purposes (United Presbyterian Church v. Reagan, 1984).

6. He dismissed Watergate Special Prosecutor Cox in the "Saturday Night Massacre" of 1973, an action characterized by a federal judge as "illegal" because there was no finding of "extraordinary impropriety" — the only basis for dismissal under the existing Justice Department regulation (Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973)).

B. Judicial Philosophy

More important than all of the preceding substantive views is Bork's basic concept of the role of the federal courts, a concept he has expressed repeatedly on the bench of the Circuit Court of Appeals in case after case, in concurrence and dissent, sometimes at great length: that the federal judiciary should refrain from deciding cases that might countermand the decisions of other branches of government, the states or foreign powers.

To this end he has sought to interpose as shields against individual litigants, churches, public-interest groups, minorities (and even members of Congress seeking to obtain rulings on allegedly unlawful actions of the Executive) the principles of lack of standing, separation of powers, executive responsibility in foreign relations, or sovereign immunity (Tel-Oren v. Libyan Arab Republic, 25-page concurrence, 1984; Persinger v. Iran, majority opinion, 1984; Barnes v. Kline, 32-page dissent, 1985; Abourezk v. Reagan, 15-page dissent, 1986; Hohri v. U.S., 10-page dissent, 1986; Bartlett v. Bowen, 19-page dissent, 1987; Haitian Refugee Center v. Gracey, 10-page majority opinion, 1987).

In Bork's view, the federal courts should defer to other governmental bodies -- the "political" branches -- on all "political" matters unless the Constitution explicity directs otherwise-- with one striking exception: "When business and industry groups sued federal agencies, Bork voted for the business groups in 7 out of 8 (non-unanimous) cases." (Columbia Law Review study, "All the President's Men," 87 Col. L. Rev., forthcoming).

The effect of Bork's advocacy of "judicial restraint" would be to relinquish the responsibility of the federal courts to "say what the law

is" (Marbury v. Madison, 1803), at least in cases where the plaintiffs are individuals, minorities or citizen groups seeking vindication of constitutional rights. The shields that Judge Bork would interpose against them also serve to shield the powerful against the weak. The executive and legislative branches, the states, majorities, immune sovereigns, and vast economic enterprises do not need the courts' protection; they can protect themselves. It is victimized individuals, minorities, and the unrecognized public good that need the protection of the courts, and it is precisely this protection that Bork's concept of "judicial restraint" would deny them.

For the courts to deny to victims a judicial remedy, telling them to apply instead to the "political" branches for relief, would undo the protection, not only of Marbury v. Madison, but of a later Supreme Court decision:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. (West Virginia Board of Education v. Barnette, 1943)

STAFF RESEARCH REPORT
ON THE NOMINATION OF JUDGE ROBERT H. BORK
TO THE SUPREME COURT OF THE UNITED STATES

Dean M. Kelley
Director, Religious and Civil Liberty
National Council of the Churches of Christ in the U.S.A.

I. Is It Appropriate to Consider the Substantive Views of a Nominee on Subjects Likely to Come Before the Court?

Despite contentions to the contrary by the White House, the Justice Department and some Republican Senators, the case is clear that the Senate is perfectly within its rights to consider the ideology, judicial philosophy and general outlook on life of a candidate for the Supreme Court as well as his or her views on specific issues of adjudication -- at least to the degree these are evident in the candidate's prior writings, speeches and decisions.

It is equally appropriate for citizen groups to testify in Senate hearings or otherwise make known their views about the suitability of the nominee from the standpoint of their particular needs or interests.

The case for senatorial responsibility for assessing the entire range of a nominee's qualifications, including his or her substantive views, has been made in some detail by Prof. Laurence H. Tribe of the Harvard Law School in God Save This Honorable Court (Random House, 1984), showing that the Senate has weighed the philosophical and political attributes of nominees to the Supreme Court bench -- as well as their legal competence and moral character -- throughout the nation's history.

That it is right to do so is confirmed by the history of the Constitutional provision for the appointment of "Judges of the supreme Court," now in Article II, Section 2. The "Virginia Plan," introduced at the beginning of the Constitutional Convention, envisioned that the appointive power would reside in the legislative branch. Subsequent efforts to share the appointive power with the executive were at one point defeated by 6 states to 2 and again by 6 states to 3, and only at the end of the Convention were they adopted in the form now familiar, so that it is the President whose role in the appointive process was added to the Senate's, which was never in dispute. (Madison, James Debates in the Federal Convention of 1787, Prometheus, 1987 pp. 97, 277, 303).

In view of this at least equal share of responsibility for appointments between legislative and executive branches, the Senate is entitled to take into consideration as full a range of factors and concerns as is the President. Among these is the effect a given appointment will have upon the Supreme Court as a whole and its ability to deal with the full range of the nation's constitutional adjudication.

One of the important considerations that both the President and the Senate have weighed (with others) in assessing candidates for the Supreme Court is their "representativeness" of the legal and experiential resources available. Some have contended that appointees to the Court should have prior judicial experience. Others have urged that women and minorities have contributions to offer to the Court's collective insights that have not been adequately utilized.

Sometimes an effort has been made to stake out a territorial claim to a "Jewish seat" or a "Catholic seat," but these have not been uniformly successful, and it seems generally accepted that no religious or ethnic sector of the population can claim entitlement to representation on the Court as a matter of right. Nevertheless, a clear desideratum is wide representation of the nation's diverse regions, traditions and legal and political philosophies, so that the Court may have the benefit of as rich a range of insights as possible, which is the main reason for having multiple membership on the bench: to supplement the monocular perspective of any single judge.

From that standpoint the Senate might well be justified in concluding that the Administration has been oversampling from one particular lode of legal experience and outlook: two nominees in succession from the same sources -- conservative, intellectual, academic products of the University of Chicago Law School sitting on the District of Columbia Court of Appeals, where they voted alike 90% of the time when they sat on the same panel (Walter Dellinger, ABA Convention, Bicentennial Showcase, Aug. 9, 1987). The Senate, without any reflection on either Justice Scalia or Judge Bork, might be justified in saying for this reason alone: not this nominee at this time; send us a representative of a significant American school of thought not already heavily represented on the present Court!

II. What Has Judge Bork Said or Written on Issues of Importance to the NCC?

A. Some Impressive Statements

Some persons and organizations seem able to determine intuitively their stance on the Bork nomination, but the NCC should seek more objective and empirical data to arrive at its decision. For this reason primary reliance has been placed upon what Robert Bork has himself said or written on matters of importance to the NCC, not just on others' opinions about him. Careful study has been made of several hundred pages of his writings, interviews, confirmation hearings (in 1973 to be Solicitor General and in 1982 to the District of Columbia Circuit Court of Appeals) and several dozen opinions he has written (or joined) as a member of the D.C. Circuit.

While there are some subjects on which he has not written, and while not all those on which he has written are pertinent to NCC policies, it is possible to define a fairly coherent picture of his general approach to a number of moral and ethical concerns on which the NCC has spoken and acted. The picture is not altogether unfavorable. He has recently expressed recognition of the importance of morality in law:

> Constitutional doctrine cannot separate either religion and law or religion and politics. As to the first, there is very little law that does not rest ultimately upon moral choice and moral assumptions. That is inevitable. Most Americans believe that morality derives from religion. They will, as they always have, continue to legislate on the basis of their moral-religious beliefs. More than that, clergy of various denominations will, as they always have, continue to proclaim what Christianity or Judaism requires of government policy. They will often be demonstrably wrong because great moral precepts do not translate into policy detail, and the clergy may or may not understand the reality -- often economic or technological or political -- which lies between the moral precept and the choice of wise action. Still, the participation of churches and of those who address politics in religious terms serves as a reminder that public policy ought always to be based upon, and held accountable to, morality -- not simply upon interest group struggles.
>
> -- "Religion and the Law," An Address at the John M. Olin Center for Inquiry into the Theory & Practice of Democracy, Univ. of Chicago, Nov. 13, 1984

On freedom of speech, Judge Bork wrote an opinion for a unanimous court denying the right of the Washington Transit Authority to ban a poster ridiculing the Reagan Administration with the slogan, "Tired of the Jellybean Republic?"

> There is no doubt that this poster conveys a political message; nor is there a question that the authority has converted its subway stations into public fora by accepting other political ads.... The [state] interest in preventing deception is not served here because the poster is not deceptive....After carefully inspecting the poster, this court concludes that no reasonable person could think this a photograph of an actual meeting. The message is that of an advocate. There is no pretext of objectivity....
>
> An assessment of the deceptiveness of the message [by the

> Authority as a reason for prior restraint] necessarily involves a judgment about its substance and content. It is not (merely) a time, place and manner regulation [which might be permissible]."
> --Lebron v. Wash. Area Metrop. Transit Authority, 749 F.2d 893 (Dec. 14, 1984)

That is a straightforward, run-of-the-mill free-speech ruling. So is another that also may seem to cut against the interests of the incumbent Administration. The Young Conservatives Alliance was prohibited by an ordinance of the District of Columbia from picketing the Soviet embassy. Judge Bork wrote an opinion for the majority of the court upholding the ordinance pertaining to embassies:

> For as long as the U.S. has existed, the rights of ambassadors have been recognized to include those implicated here -- protection from intimidation, from potential violence, and from assaults on the dignity and peace of the embassy.... YCAA offers extensive analogies to prior cases involving protests in front of the White House, the Capitol and the Supreme Court building but, for several reasons, the regulations in those cases did not implicate the interests addressed [here].
>
> First, shielding U.S. officials from public protest is incompatible with our democratic structure, which relies on public criticism as a means of promoting responsive government; foreign ambassadors have no similar obligation to be accessible to public attack. Second, American diplomats living overseas are always to some degree at risk; the perception abroad that this government is diminishing the protection accorded embassies to whom it is host would seriously compound that risk. Finally, this case involves a question of the U.S. living up to its obligations under international law.
>
> The statute, then, is supported by a compelling governmental interest that imposes only a very minor geographical limitation on speech.... The YCAA is free to demonstrate anywhere but within 500 feet of embassies.... Congress has met an unusually difficult problem with a balanced attempt to restrict no more speech than necessary.
>
> -- Finzer v. Barry, 798 F.2d 1450 (8/19/86)

Judge Bork has also written in support of freedom of the press, concurring in an en banc decision holding the columnists Evans and Novack immune from suit for defamation by a Marxist professor who was denied promotion because of their description of his reputation. It involves a significant disagreement with Judge Scalia over "judicial restraint."

> The American press is extraordinarily free and vigorous, as it should be. It should be, not because it is free of inaccuracy, oversimplification, and bias, but because the alternative to that freedom is worse than those failings....
>
> Judge Scalia's dissent implies that the idea of evolving constitutional doctrine should be anathema to judges who adhere to a philosophy of judicial restraint. But...there is not at issue here the question of creating new constitutional rights or principles.... When there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision -- such as the first amendment -- whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges -- and certainly no office for a philosophy of judging -- if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judges in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know.... The first amendment's guarantee

> of freedom of the press was written by men who had not the remotest idea of modern forms of communication. But that does not make it wrong for a judge to find the values of the first amendment relevant to radio and television broadcasting.
>
> So it is with defamation actions. We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of those clauses. Perhaps the framers did not envision libel actions as a major threat to that freedom.... But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines?... To say that such matters must be left to the legislature is to say that changes in circumstances must be permitted to render constitutional guarantees meaningless....
>
> We must never hesitate to apply old values to new circumstances, whether those circumstances are changes in technology or changes in the impact of traditional common law actions.
>
> * * *
>
> The only solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury.
>
> -- Ollman v. Evans, 750 F.2d 970 (1984), Bork concurring, joined by three other Circuit judges.

From the foregoing it should be apparent that Judge Bork is not a one-dimensional figure, that he is able, articulate and complex, has significant principles and has acquired impressive experience as legal scholar, teacher, judge and Solicitor General. Whether that means he is the best, or an acceptable, candidate for the one vacancy on the U.S. Supreme Court now open is not yet apparent. Those attributes should suffice to bring him up to the start; all candidates for such a significant life-tenured position should have comparable credentials. The searching and dispositive tests are yet to come. In the case of Judge Bork this examination is made easier by the very extensive volume of views he has expressed on legal and constitutional issues, more extensive than most nominees for such a position.

B. Policy Issues of Concern to the NCC

The next step in an evaluation of Judge Bork's fitness to serve on the U.S. Supreme Court from the standpoint of the interests of the NCC is to examine his views, where known on issues and cases -- on which the NCC has developed policy or taken action. There are areas in which his views are well known and highly controversial -- such as governmental regulation of abortion, of combinations in restraint of trade, or of homosexual conduct in the Navy -- on which the NCC does not have policy, and they are therefore not considered here. But there are numerous subjects on which comparisons can be made, including his defenses of freedom of speech and press referred to earlier, which are consonant with NCC policy on those subjects expressed in its policy statement HUMAN RIGHTS (1963).

1. "One person, one vote."

One of the important watersheds for responsible democratic government was the series of Supreme Court decisions on reapportionment beginning with Baker v. Carr (1962) and continuing through Gray v. Sanders (1963), Wesberry v. Sanders (1964), Reynolds v. Sims (1964), Maryland v. Tawes (1964) and Lucas v. Colorado (1964), in which the Court entered the "political thicket" -- over the protests of Justice Frankfurter and other advocates of "judicial restraint" -- to correct ingrained abuses that malapportioned legislatures refused to correct. The Tennessee legislature in Baker was plainly illegal under state law and had been so for 60 years, but the legislature refused to reform itself, rural members representing more trees and cows than people resisted sharing their dominance with urban legislators from under-represented districts. The Supreme Court's decisions on this subject were greeted with cries of outrage, and several efforts were made to reverse them by Constitutional amendment, all of which failed, and the principle of "one person, one vote" is now generally accepted as a just requirement of democracy.

The NCC was active in opposing efforts to reverse the reapportionment decisions by Constitutional amendment, implementing its policy statement EQUAL REPRESENTATION IS A RIGHT OF CITIZENSHIP (1965).

Judge Bork, in a 1971 law review article, has denounced those decisions in no uncertain terms:

> The state legislative reapportionment cases...are remarkable for their inability to muster a single respectable supporting argument. The principle of one man, one vote was not neutrally derived: it runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula.
>
> -- "Neutral Principles and Some First Amendment Problems" 47 Indiana Law Journal, 1, at 18 (1971).

(Judge Bork reaffirmed this view that the "one man, one vote" principle was an error in his 1973 hearing in the Senate Judiciary Committee.)

2. Standing to sue to challenge violations of the Establishment Clause

Under the rule of Frothingham v. Mellon, 262 U.S. 447 (1923), federal taxpayers were held not to have standing to challenge the constitutionality of Congressional appropriations. An exception to that policy was created by the Warren Court in 1968 to permit challenges to appropriations alleged to violate the No-Establishment Clause of the First Amendment -- in this instance aid to parochial schools under the Elementary and Secondary Education Act as applied in New York City -- Flast v. Cohen, 392 U.S. 83 (1968). The NCC, which had supported that Act in a resolution on "Federal Aid to Education" in 1965, believed the NYC practices to be contrary to the "child-benefit theory" in the Act, and so entered a brief amicus curiae in the U.S. Supreme Court supporting the petition of the Committee for Public Education and Religious Liberty to obtain standing for their suit challenging the New York practices -- an effort that was successful, though opposed by Justice Harlan.

Judge Bork, seventeen years later, contended that Flast was an unfortunate error:

> Flast's view of standing has proved to be an aberration, for divorcing standing from separation-of-powers considerations inexorably leads to successive accretions to the power of the federal judiciary, a result the Framers certainly did not intend. Valley Forge and Allen v. Wright demonstrate that the Court, reversing the course it took in Flast, has restored separation-of-powers considerations as the central premise of the constitutional standing requirement.
>
> -- Barnes v. Kline (dissent), 759 F.2d 21 (1985)

(More on "standing" in part IV below.)

3. Rights of illegitimate children and applicants for public welfare.

The Supreme Court in 1968 overturned a Louisiana law which denied illegitimate children the right to sue for wrongful death of parents (while granting it to legitimate children) -- Levy v. Louisiana, 391 U.S. 68 (1968) -- and the next year struck down a one-year residence requirement for public welfare applicants as a state restriction on the right to travel -- Shapiro v. Thompson, 394 U.S. 618 (1969). The NCC had urged this outcome in amicus briefs pursuant to the policy statement on HUMAN RIGHTS (1963).

These were among a series of decisions by the Warren Court denounced by Judge Bork in 1971:

> The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as

> "fundamental" interests in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as Griswold v. Connecticut...; Shapiro v. Thompson...; Levy v. Louisiana.... The list could be extended, but the point is that the cases cannot be reconciled on any basis other than the Justices' personal beliefs about what interests or gratifications ought to be protected.... These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions.
>
> -- "Neutral Principles..." 47 Ind. L.J. 1 at 11-12(1971)

4. The death penalty

The NCC on the strength of its 1968 policy statement, ABOLITION OF THE DEATH PENALTY, has participated in vigils of protest at several executions and has filed amicus briefs urging restrictions on the use of capital punishment (Aikens v. California, 1971; Fowler v. North Carolina, 1975; Spinkellink v. Wainwright, 1978; Tison v. Arizona, 1980) pressing the view that killing criminals is coming to be viewed as "cruel and unusual punishment." Once it was generally accepted that flogging, blinding, cutting off hands and ears and piercing tongues were suitable punishments for crime, but no longer. A similar humanitarianization has been taking place with respect to the death penalty.

Judge Bork does not agree. In an interview published in Judicial Notice, June 1986, he said:

> [T]he issue is almost concluded by the fact that the death penalty is specifically referred to, and assumed to be an available penalty, in the Constitution itself. In the Fifth Amendment and in the Fourteenth Amendment. It is a little hard to understand how a penalty that the framers explicitly assumed to be available, can somehow become unavailable because of the very Constitution the framers wrote. I suppose...[they] would proceed, as some of them have, by saying, "Well, the standard, for example, of what is a cruel and unusual punishment under the Eighth Amendment is an evolving standard. It moves with society's new consensus about what is consistent with human dignity, what is too cruel, etc., etc." And then they say that evolving standard has now reached the death penalty, and eliminates it. But it is not made clear why the standard should evolve.... Furthermore, if we do look to what society's current standards are, it is quite clear from the statutes on the books that society's current consensus favors use of the death penalty. I am not discussing whether the death penalty is a good or a bad idea, but only the different constitutional approaches to it.

(Bork's view would be that this is a matter for the legislature to determine, not the courts, of which more in part IV below.)

5. Religion clause(s) of the First Amendment

On the strength of several policy statements supporting religious liberty and separation of church and state, the NCC has filed briefs amicus curiae in several cases urging maximal application of the Free Exercise and No Establishment clauses of the First Amendment. There is an opposing school of thought which urges that the scope of both clauses be severely reduced, thereby cutting back on the rights of persons and groups to freedom of religion and to freedom from an establishment of religion. The most recent and extensive statement of that school of thought from a judicial source was the vehement dissent of Justice Rehnquist in Wallace v. Jaffree, 105 S. Ct. 2479 (1985), in which he contended that the Establishment Clause was originally intended only "to prevent the establishment of a national religion or the governmental preference of one religious sect over another," and urged the Court to abandon the three-prong Lemon test of establishment under which the Court has struck down state-sponsored prayer in public schools and state aid for religious schools. Justice Rehnquist, dissenting in Thomas v. Review Board, 450 U.S. 707 (1981), also urged that the Court's free-exercise test be cut back from the Sherbert standard -- that an individual's sincere religious objection can be outweighed only by a "compelling state interest" that can be served in no less burdensome way -- to a requirement that the state show only that its rule is "a reasonable means of promoting a legitimate public interest" (Bowen v. Roy, 106 S.Ct. 2147 (1986) opinion of Chief Justice Burger, concurred in (only) by Powell and Rehnquist).

In two recent addresses, Judge Bork seems to identify himself with the Rehnquist school of thought that would reduce the scope of both religion clauses:

> The point I want to make about these [Establishment Clause] cases...is that the three-part [Lemon] test...is not useful in enforcing the values underlying the establishment clause.... There is...evidence that tends somewhat to bolster Robert L. Cord's claim that the first amendment was not intended to prohibit the nondiscriminatory advancement of religion, so long as religious belief was not made a requirement in any way.... [Referring to Cord, R.L., Separation of Church and State: Historical Fact and Current Fiction, N.Y.: Lambeth Press, 1984, cited by Rehnquist in Jaffree]
>
> The free exercise clause has received similarly expansive interpretation.... [B]road interpretations of the two religion clauses have brought the two into conflict.... The classic example...is Wisconsin v. Yoder. The state had the usual compulsory education law requiring attendance to the age of sixteen. [Bork's handwritten interpolation: It was a secular law.] It was challenged by Amish parents who said it violated their religious tenets to send their children to public school beyond the eighth grade. The Supreme Court ruled for the Amish under the free exercise clause. This, in substance, required Wisconsin to give an exemption to one religious group from its general laws. Had Wisconsin attempted to grant the exemption voluntarily, by statute, there is little doubt under existing doctrine that the exemption could have been successfully challenged as an establishment of religion.
>
> [We] may see a major recasting of doctrine...because...present doctrine is so unsatisfactory.
>
> * * *
>
> A relaxation of current rigidly secularist doctrine would...permit some sensible things to be done. Not much would be endangered if a case like Felton went the other way and public school teachers were permitted to teach remedial reading to that portion of educationally deprived children who attend religious schools. I suspect that the greatest perceived change would be in the reintroduction of some religion into public schools and some greater religious symbolism in our public life."
>
> -- "Religion and the Law," Univ. Chicago, 1984, (similar material, much of it identical, in another speech given at the Brookings Institution, Sept. 12, 1985)

NCC entered a brief amicus curiae in Wisconsin v. Yoder (1972) urging the result criticized by Bork. It advanced the amendments adopted by Congress limiting the assignment of public school teachers to parochial school premises in Title I of the Elementary and Secondary Education Act at stake in Aguilar v. Felton (1985), and supported challenges to the NYC practices to the contrary (cf. Flast v. Cohen, referred to in IIB2 above). It opposed seven successive public-school-prayer amendments that would have overturned the Supreme Court's decisions and permitted "reintroduction of some religion into public schools." It filed briefs amicus curiae in Lynch v. Donnelly (1984) and other cases objecting to public Nativity shrines of the sort that would inject "some greater religious symbolism in our public life."

6. Intelligence agency surveillance of churches

The NCC joined as co-plaintiff in a lawsuit challenging the President's Executive Order No. 12333 because it permitted U.S. intelligence agencies [among other things] to use clergy, missionaries and pseudo-religious proprietaries for intelligence-gathering purposes (United Presbyterian Church v. Reagan).

Judge Bork joined a 1984 decision written by Judge Scalia upholding dismissal of this suit for lack of standing of plaintiffs because of their failure to show injury-in-fact.

> Executive Order No. 12333 issues no commands or prohibitions to these plaintiffs, and sets forth no standards governing their conduct.
>
> * * *

> [N]o part of the challenged scheme imposes or even relates to any direct governmental constraint upon the plaintiffs, and there is no reason why they would be unable to challenge any illegal surveillance of them when (and if) it occurs.

[If they know about it.]

* * *

> To give these plaintiffs standing on the basis of threatened injury would be to acknowledge, for example, that all churches would have standing to challenge a statute which provides that search warrants may be sought for church property if there is reason to believe that felons have taken refuge there. That is not the law.
>
> -- United Presb. Church v. Reagan, 738 F.2d 1375 (1984)

(For more on "standing," see part IV below.)

7. Interdiction of Haitian refugees,

The NCC has been active for a number of years in service to Haitian refugees, particularly in Florida. It sponsored lawsuits against the Immigration and Naturalization Service which obtained court orders requiring the INS to grant individual hearings to Haitian refuge-seekers to determine whether they qualified as refugees under the United Nations Protocol on Refugees and the U.S. Refugee Act (Haitian Refugee Center v. Smith, 1982).

The U.S. Government in 1981 began a strategy of intercepting boats bearing refuge-seekers from Haiti on the high seas, interviewing each passenger and returning to Haiti any who could not show (even by "bare claims") a "well-founded fear of persecution for political reasons." Amazingly, in the 78 vessels intercepted more than 1800 Haitians were found, none of whom presented a bona fide claim to refugee status and all were returned to Haiti! In the light of this incredible performance, the Haitian Refugee Center in Miami and two of its members sued the Coast Guard to halt the strategy of interdiction. The District Court dismissed the suit on the ground that the plaintiffs had failed to state a claim on which relief could be granted.

The Circuit Court upheld the dismissal in a 20-page opinion written by Judge Bork that is even more convoluted than most opinions explaining standing. The Center was found to have established "injury in fact" -- obstruction of its purpose to serve the needs of Haitian refugees -- but the injury was held not to be traceable to the interdiction program or redressable by a favorable decision.

> [T]he interdiction program is not aimed at preventing Haitian refugees from dealing with the HRC. The prevention of that relationship is merely an unintended side effect of the program. Accordingly, the HRC lacks article III standing to challenge the interdiction program.
>
> - Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987).

(More on "standing" in part IV below.)

8. Civil rights and affirmative action

Some of the critics of the Bork nomination have cited an article he wrote for New Republic in 1963 opposing provisions of the Civil Rights Act then being considered by Congress that would desegregate public facilities, but at the Senate hearing in 1973 to consider his confirmation as Solicitor General, he retracted that view.

> Mr. Bork: I should say that I no longer agree with that article and I have some other articles that I no longer agree with.... [I]t seems to me I was on the wrong track altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today I would support it.

At the same hearing he was less repentant of earlier criticisms of Harper v. Virginia Board of Elections, which struck down a poll tax alleged to have restricted voting by blacks. He commented "As I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other."

In 1972 the Nixon Administration sought to restrict remedies the Supreme Court had held were necessary to correct unconstitutional school segregation, and Bork was one of only two law professors to testify in favor of the Nixon policies, whereas 500 law professors contended that they were unconstitutional. As Solicitor General he is reported to have opposed remedies for discrimination in housing and schools, and was overruled by Attorney General Levi when he proposed to file an amicus brief opposing black parents and students in the Boston school desegregation case. (People for the American Way, "Robert Bork; the Wrong Man, the Wrong Place, the Wrong Time" n.d., p.10)

The NCC has policy opposing segregation, racial discrimination and limitation of voting rights. It filed briefs amicus curiae supporting affirmative action in Weber v. Kaiser Aluminum, 1978, and Regents v. Bakke, 1977.

9. Bork's role in firing Archibald Cox

Many people's sole basis for name-recognition of Robert Bork at the time of his nomination to the Supreme court was his role in firing Archibald Cox, the Special Prosecutor at the time of the Watergate investigation in 1973, completing the "Saturday Night Massacre." The U.S. Court of Appeals had affirmed a lower court ruling that President Nixon must turn certain tapes over to Judge Sirica. Rather than appeal that decision to the Supreme Court, Nixon let the time for appeal pass and then directed Cox not to proceed further with the case. Cox refused to retreat, and the President ordered the Attorney General to discharge him. The Attorney General, Elliott Richardson, resigned rather than do so, and so did Deputy Attorney General William Ruckleshaus. Robert Bork, as Solicitor General, succeeded immediately to the position of Acting Attorney General, and before the day was out, he acceded to the President's wishes and discharged Cox, contrary to the terms of the Justice Department regulation, which provided that the Special Prosecutor was not to be removed "except for extraordinary improprieties on his part." His only impropriety had been to refuse to abandon the investigation he was employed to carry out.

Bork's action was subsequently found by a respected federal judge, Gerhardt Gesell, to have been unlawful: "The firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal."

-- Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), appeal dismissed as moot (D.C. Cir. 1975).

Elliott Richardson has since expressed approval of Bork's role in preventing the decimation of the upper ranks of the Justice Department, and Bork explained his role in his 1982 hearing on nomination to the District of Columbia Circuit Court of Appeals, pointing out that he had not been brought into the Justice Department by Richardson and was not bound by the promises Richardson had made to the Senate at his confirmation not to fire Cox.

> I had made no such representations, and therefore I had a moral choice to make free of those problems they had.
>
> I would make two points about the decision to discharge [Cox]: One is that there was never any possibility that that discharge of the Special Prosecutor would in any way hamper the investigation or the prosecutions of the Special Prosecutor's office. Neither the President nor anyone else at the White House ever suggested to me that I do anything to stop or hinder in any way those investigations. If I had been asked to do that, I would not have done it.
>
> * * *
>
> When I named Mr. Leon Jaworski later as the Special Prosecutor, I made the same promises...to him and those promises were kept.... The investigations went forward with the results we all know and are now a part of American history. At no time was there any threat to the integrity of the processes of justice.
>
> The second point I want to make is simply this.... The reason for the discharge was that I had, I thought, to contain a very dangerous situation, one that threatened the viability of the Department of Justice and of other parts of the executive branch.

> The President and Mr. Cox had gotten themselves, without my aid, into a position of confrontation.... There was nobody after me in the line of succession, nobody. If I resigned, there was simply nobody who stepped into that position.
>
> At that point, the President was committed because of this symbolic confrontation to discharging Mr. Cox. He would have appointed, I assume, an Acting Attorney General and he probably would have had to go outside the Department of Justice to do so.... There was never any question that Mr. Cox, one way or another, was going to be discharged.
>
> At that point you would have had massive resignations from the top levels of the Department of Justice.... If that had happened, the Department of Justice would have lost its top leadership, all of it, and would I think have effectively been crippled.
>
> For that reason I acted, made the discharge....None of them left; they all stayed with me, stayed with the Department.
> -- Hearings, 1982, Part 3, pp.9-10.

In other words, Mr. Bork stood between a rogue President and the full consequences of his folly, which eventually caught up with him anyway. Would it have been better if the entire upper ranks of the Justice Department had resigned en masse rather than consent to the President's vendetta against Cox? Who can say? The NCC has taken no position on that question, though it was one of the first national organizations to call for Nixon's impeachment (February 28, 1974). This act is one of the most salient elements in Robert Bork's public persona, and people will need to evaluate the significance of the "moral choice" he made especially in view of the challenges to the constitutionality of special prosecutors that are already working their way through the courts in connection with the "Contragate" investigations and other cases and may eventually reach the Supreme Court.

III. What Is Judge Bork's Underlying View of the Judicial Function?

Underlying Judge Bork's views on various specific issues is his basic concept of what (federal) judges should do, which he has reiterated again and again. Essentially it is that they should refrain from deciding disputes brought before them whenever possible, at least in certain broad categories of disputes. (--A view reminiscent Herblock cartoon portraying President Eisenhower asking his cabinet, "What shall we refrain from doing today?")

A. "Equal Gratification"?

In his 1971 law review article, Judge Bork contended that there is no "principled" way for judges to choose between contending claims unless the Constitution itself explicitly expresses a choice.

> [W]hen is authority legitimate?... [This question] arises when any court either exercises or declines to exercise the power to invalidate any act of another branch of government. The Supreme Court is a major power center, and we must ask when its power should be used and when it should be withheld.
>
> * * *
>
> Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved...by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution....
>
> But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinion that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court...necessarily abets the tyranny either of the majority or of the minority.
>
> * * *

> Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.
>
> * * *
>
> In Griswold [v. Connecticut] a husband and wife assert that they wish to have sexual relations without fear of unwanted children. The law [against contraceptives] impairs their sexual gratifications. The State can assert...that the majority finds the use of contraceptives immoral. Knowledge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratification.
>
> * * *
>
> Unless we can distinguish forms of gratification, the only course for a principled Court is to let the majority have its way.... There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another. Why is sexual gratification more worthy than moral gratification?... There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy....
>
> One of my colleagues refers to this conclusion...as the "Equal Gratification Clause." The phrase is apt, and I accept it. Equality of human gratifications, where the document does not impose a hierarchy, is an essential part of constitutional doctrine because of the necessity that judges be principled....
>
> [That] principle is not applicable to legislatures. Legislation requires value choice.... Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.
>
> -- "Neutral Principles"... 47 Ind. L.J. 1 (1971).

Judge Bork appeared to regard these views a bit more tentatively (though they were not written in a tentative vein at all) in his confirmation hearing to be Solicitor General in 1973:

> The article you have there...is explicitly a tentative and rather theoretical attempt to deal with the problem, and it starts off with an attempt to pick up Professor Wechsler's concept of neutral principles and see what can be done with that concept. At the end of the article I point out that I think these are the conclusions that are required by that idea of neutral principles, but that I am not sure about the whole subject.

In his 1982 confirmation hearing to be a Circuit Court judge, he made somewhat the same disclaimer: "I was engaged in an academic exercise...a theoretical argument, which I think is what professors are expected to do." And in rejecting a 1983 critique of his law review article ("Robert Bork and the Constitution," Nation, Oct. 1, 1983), Bork wrote, "Even in 1971, I stated that my views were tentative.... As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse...are central to democratic government and deserve protection. I have repeatedly stated this position in my classes." (ABA Journal, Dec. 1983)

In each of these disclaimers, however, he was responding to criticism of one particular implication of the "neutral principles" idea -- that only political speech is protected by the Free Speech Clause. He was not necessarily disclaiming the whole article. He did reject (in the ABA Journal rebuttal) the allegation that his view was "animated by moral skepticism," seeming to feel that his own morality was being impugned, which was not the case. What was characterized as "moral skepticism" -- and what he did not deny -- was the philosophical position that there is no objective way to prove the rightness or wrongness of particular moral judgments, and that it is not proper -- or possible -- for a judge to do so except in the very limited way

derived directly from the explicit value choices set forth in the Constitution. He has not said or written anything setting forth a counter-exposition of another view of judicial responsibility -- unless it be the passage on "judicial restraint" -- disagreeing with Justice Scalia -- in his concurrence in Ollman v. Evans, 750 F.2d 970 (1984), (see page 4 above), which represents an argument over whether judges have little leeway in interpreting the Constitution's explicit commands or no leeway.

B. Limiting Access to the Courts

Perhaps a more telling evidence of Bork's judicial disposition is his strategy in utilizing whatever leeway he thinks federal judges do have. In case after case, in concurrence and in dissent, he has made repeated efforts to reduce the scope of federal court jurisdiction in deference to Congress, the Executive, state legislatures, foreign sovereignties, etc.

1. Survivors of a terrorist attack on a bus in Israel sued the Libyan Arab Republic in U.S. courts for damages. The district court dismissed the suit for lack of jurisdiction of the subject-matter, and the D.C. Circuit Court affirmed. Judge Bork wrote a long concurrence expressing his view:

> Neither the law of nations nor any of the relevent treaties provides a cause of action that appellants may assert in courts of the United States. Furthermore, we should not, in an area such as this, infer a cause of action not explicitly given. In reaching this latter conclusion, I am guided chiefly by separation of powers principles, which caution courts to avoid potential interference with the political branches' conduct of foreign relations.
>
> -- Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (1984)

2. A former hostage of the seizure of the American embassy in Teheran brought suit against Iran for injuries inflicted. The D.C. Circuit had ruled that President Carter's agreement with Iran to secure release of the hostages extinguished all private claims. The U.S. government moved for rehearing on the issue of sovereign immunity, and the D.C. Circuit, in an opinion written by Judge Bork, vacated its previous ruling and decided:

> Since we decide that in this case Iran is not subject to this court's jurisiction [because of sovereign immunity], it would be improper for us to reach the question of the President's authority over these claims. To exceed the jurisdictional limits of a court's power is to exercise authority illegitimately.
>
> -- Persinger v. Iran, 729 F.2d 835 (1984).

3. Thirty-three individual members of the House of Representatives, joined by the Speaker and bipartisan leadership of the House and by the entire Senate, sued to invalidate the President's attempted "pocket veto" of certain legislation, and the D.C. Circuit held that the purported veto was invalid, over the vehement 32-page dissent of Judge Bork, echoing a view he had stated earlier in Vander Jagt v. O'Neill, 699 F.2d 1166 (1983), objecting to courts' recognizing the standing of members of Congress to sue the President.

> "Standing" is one of the concepts courts have evolved to limit their jurisdiction and hence to preserve the separation of powers... Courts have routinely regarded injury to [an interest in the proper constitutional performance of the government] as not conferring standing to litigate..., [since to do so] would so enhance the power of the courts as to make them the dominant branch of government. There would be no issue of governance that could not at once be brought into the federal courts for conclusive disposition. Every time a court expands the definition of standing, the definition of the interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts. That is what is happening in this case.
>
> * * *
>
> The concept of congressional standing...rests upon the idea that members of Houses of Congress must be able to sue to vindicate powers or rights lodged in them by the Constitution.... This may sound unexceptional; it is, in fact, a constitutional upheaval.... Congress is not alone in having governmental powers created or contemplated by the Constitution.... "Congressional standing" is

merely a subset of "governmental standing." This rationale would...confer standing upon [the President and the judiciary to sue other branches and upon] states or their legislatures, executives or judges to sue various branches of the federal government.

* * *

The majority [of this Court] finds...the [alternative] idea of political struggle between the political branches distasteful.... Just so. That is what politics in a democracy is and what it involves.... I know of no grave consequences for our constitutional system that have flowed from political struggles between Congress and the President. This nation got along with that method of resolving matters between the branches for 185 years, until this court discerned that the nation would be better off if we invented a new role for ourselves.

-- Barnes v. Kline, 759 F.2d 21 (1985)(Bork dissent)

4. Senator Abourezk and others sued the President and the Secretary of State for denying visas to several peace activists to come to the U.S. to speak to public meetings. The D.C. Circuit remanded the case to the district court to determine if certain technicalities had been met. Judge Bork filed a 15-page dissent from the remand, contending that courts should defer to the executive agency if it has made a reasonable ruling on the matter.

This principle of deference applies with special force where the subject...is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs. Such authority is fundamentally executive in nature.... The Supreme Court has described the exclusion of aliens as "a fundamental act of sovereignty," stating that [it]... "is inherent in the executive power to control the foreign affairs of the nation."

-- Abourezk v. Reagan, 785 F.2d 1043 (1986)

5. Japanese internees dispossessed of property on the West Coast during World War II sued for recovery when the claims of "military necessity" were shown to have been unfounded. The D.C. Circuit affirmed dismissal of all but one claim, which it sought to salvage from a six-year statute of limitations. The U.S. moved for rehearing, which was denied by a majority of the D.C. Circuit. A dissent from that denial was entered by Judge Bork, joined by Judges Scalia, Starr, Silberman, and Buckley, contending that the panel had created an intolerable precedent in trying to avoid the statute of limitations.

This case illustrates the costs to the legal system when compassion displaces law. The panel majority says it is not too late for justice to be done. But we administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law.

-- Hohri v. U.S., 795 F.2d 304 (1986)

6. Plaintiff brought suit to collect $286 in Medicare claims denied by the Social Security Administration because of a curious provision in the Medicare Act which bars payment for extended care in a skilled nursing facility unaffiliated with Christian Science to anyone who has, during the same spell of illness, already received such benefits for extended care in a Christian Science nursing facility. Plaintiff claimed that this restriction interfered with her free exercise of religion by limiting her to exclusively Christian Science care if she obtained any such care. The government defended on the ground that Congress had barred judicial review of Medicare claims under $1000. The D.C. Circuit held that Congress did not intend to bar judicial review of constitutional challenges to the Act. Judge Bork filed a 19-page dissent insisting that the suit was barred by the principle of sovereign immunity: that the U.S. cannot be sued without its consent, and Congress had explicitly refused to waive sovereign immunity with respect to Medicare claims. The majority of the panel maintained that Congress had not invoked and indeed perhaps could not invoke, immunity to shield its actions from judicial review of their constitutionality, but Bork was unconvinced.

-- Bartlett v. Bowen, 816 F.2d 695 (1987)

(See also cases rejecting "standing" in parts IIB2, 6 and 7 above.)

These are but a sampling of Bork's essays on "judicial restraint," relying on doctrines of standing, separation of powers, and sovereign immunity to justify the federal courts' abstention from deciding cases brought before them by individuals or public-interest groups challenging various governmental regulations, policies or actions, ostensibly to protect the free play of democratic processes in the "political" branches of government.

A study of Bork's votes in non-unanimous cases in which he participated on the D.C. Circuit reports that "when public interest groups sued federal agencies, Bork voted for the federal agencies in 11 out of 12 cases," suggesting a predictability of outcome in favor of government. But like some other justices who have advocated judicial restraint (Frankfurter, Harlan, Rehnquist), his restraint seemed to dissolve when certain issues of special concern to him came before the court: "When business and industry groups sued federal agencies, Bork voted for the business groups in 7 out of 8 cases." (Columbia Law Review, forthcoming).

Whether Bork's stance for "judicial restraint" has a weak spot for business interests is less significant than his general disposition, which seems to be to cut back on the availability of federal courts to consider complaints by citizens against the government or other great powers that have allegedly wronged them. It may be granted that many such suits are overdrawn or frivolous, and the courts are awash in a rising tide of litigiousness. But the Bork nomination poses the question whether the people of the United States want to see the doors of the federal courts closed against most such causes, particularly public-interest causes.

IV. Is Bork's View Consonant with that of the National Council of Churches?

The National Council of Churches has never developed a comprehensive and coherent doctrine of the proper role of the judiciary or the federal courts, but certain assumptions and expectations may be discerned from its policies and actions with respect to issues before the courts.

A. Justice is not a "gratification" that is indistinguishable from injustice

The 95 briefs amicus curiae the NCC has entered, most of them in federal courts, are predicated upon the assumption that there is something called "justice" to which victims can appeal in the courts in hope of relief, remedy or exoneration, and that it is something which -- however difficult to define -- judges have some obligation to seek, recognize and affirm.

Principles of law that are "neutral" as between justice and injustice will not redound to the esteem of the courts, and a Supreme Court that resists rectifying at least some of the grosser injustices will be in worse repute than one which errs on the "activist" side. After all, despite the clamor to "Impeach Earl Warren" and the demands for Constitutional amendments to overturn the reapportionment, school prayer and abortion decisions, none has been overturned, and the Supreme Court retains remarkable prestige in the nation at large.

The same is true with respect to other key values enshrined in the Constitution: freedom, due process, equal protection of the laws, etc. They are not defined in intricate detail, fortunately, and therefore their application can be adapted to changing circumstances. And that adaptation is not subject to the standardless roulette of "equal gratifications."

Chief Justice Earl Warren may have been "simplistic" when he would ask about a situation challenged before the Court, "Is it fair?" but that was the right question. Justices may differ over what is fair, and what makes it fair, and how the unfair can be corrected, but a judge who does not resonate to the question "Is it fair?" or who considers fairness and unfairness to be indistinguishable "equal gratifications" does not have the qualities that would be most desirable on the Supreme Court.

"Justice" (or "fairness") is not the only question for the courts, and such values do not displace or outrank the explicit canons of the Constitution and the statutes, but they are indispensable in applying the Constitution and the statutes to the actual problems of real people in the contemporary world.

Judge Bork might insist that he is as concerned about fairness and justice as the next person, but that most such questions, if not explicitly resolved by the Constitution, are outside the scope of the Supreme Court; they are "political" questions, to be resolved by the "political" branches -- legislative and executive.

There are at least three answers to that contention: the first is that there are some "political" questions the "political" branches often seem unable to resolve -- among them those pertaining to their own powers, as in malapportionment. The second answer is that, just as Presidents and members of Congress take oaths to uphold the Constitution, and that task does not devolve solely upon the courts, so the judicial officers share a responsibility with the other branches for the fair and humane working of the commonwealth.

The third answer is that the rights of Americans are not limited to what is explicitly catalogued within the four corners of the written Constitution. The Declaration of Independence speaks of "certain unalienable rights" with which all are "endowed by their Creator" -- not by the State -- and James Madison and others resisted listing them in the Constitution lest it be concluded that only those listed were recognized. That is indeed what has happened with the Bill of Rights, and literalists like Judge Bork are now insisting that if a right is not explicitly covered in the wording of the Constitution (and its amendments), it doesn't exist (for purposes of the judiciary). This view runs directly counter to the explicit words of the Ninth Amendment, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

It is to the responsibility of the courts to rectify the ingrained malfunctioning of other parts of the Constitutional structure, to advace the fair and humane working of the commonwealth, and to protect the unalienable rights of the people -- including those not enumerated in the Constitution -- that the NCC has sought to point in its interventions in the courts, and it cannot concede validity to a theory of adjudication that would reject such considerations as not pertinent to American Constitutional law.

B. "Judicial restraint" is not neutral.

The one theme common to the various shields that Judge Bork and other apostles of judicial restraint would interpose against judicial activism is that they also shield the powerful against the weak. "Separation of powers," denial of .."standing" and "sovereign immunity" leave the federal government, mass media, heedless majorities and vast economic enterprises unchecked by one of the few mechanisms that might exert a countervailing influence. They do not need protection from individuals, minorities, public-interest groups; they can protect themselves. It is the victimized individuals or minorities and the unrecognized public good that need an

effective defense and a structure of intervention and constraint, which the courts could and should provide -- in at least the most clearly outrageous cases.

The thought advanced by Bork that the courts have no responsibility to act as umpire in disputes between other elements of government (lest the judicial branch become too powerful) flies in the face of 185 years of the unique American tradition of judicial review (which is not itself written in the Constitution, and perhaps that is why judicial minimalists want to cut back on it). In 1803, in Marbury v. Madison Chief Justice Marshall declared, "It is emphatically the province and duty of the judicial department to say what the law is," and that is what is at stake here.

In a time when the Executive branch seems inclined to define the law for itself in a way that justifies whatever it feels called to do, there is more than ever need for a relatively objective umpire to "say what the law is" and thus to offer an orderly check to a powerful and potentially (and sometimes actually) lawless Executive department.

The NCC is committed by theology and policy to advocacy for the weak, the powerless, the poor, the oppressed, the hungry, and -- so far as it is discernible -- the public interest. The NCC therefore has an interest in opposing the confirmation as Justice of the Supreme Court of a jurist whose insights and inclinations, as judged by his own words, seem to run the other way.

It is possible that Judge Bork's perceptions might change significantly after he attained life-tenure on the Supreme Court, as have others before him, but that is unpredictable. Those who seek to determine his suitability for the Supreme Court on the basis of objective evidence (rather than mere allegations or intuitions) must do so on the data available as to his past views and actions, taken at face value. That is, suppositions that he has been writing decisions for effect in influencing the Justice Department to nominate him for the highest bench are conjectural and give little clue as to whether the "real" Judge Bork is better or worse. It is fairer and more objective to assume that in dealing with the cases before him he meant what he said and should be judged upon it.

September 1, 1987

September 17, 1987

TESTIMONY OF THE NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS

IN OPPOSITION TO

NOMINATION OF JUDGE ROBERT BORK TO THE SUPREME COURT

Linda E. Christenson, Esq.
Director, NCWBA
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"A PAGE OF HISTORY IS WORTH A VOLUME OF LOGIC."
Justice Oliver Wendell Holmes

The National Conference of Women's Bar Associations is comprised of individual state, regional, and local bar associations. Our total representation is 100,000 attorneys - men and women attorneys across the country.

Departing from traditional silence concerning judicial nominations, the National Conference of Women's Bar Associations is compelled to oppose the nomination of Robert Bork to the Supreme Court. To do otherwise, would be disloyal to the principles, standards, and goals of our Constitution. Our Constitution states general principles formed from the basic premise that each individual has a right to security of person, as well as of property.

The key to understanding Robert Bork is his belief that the Constitution's protection of individual freedom is constrained by literal interpretation. In an address delivered March 31, 1987, called "Interpreting the Constitution", Robert Bork stated "The Constitution can be law only if it is applied as intended." We agree. Unfortunately, Judge Bork's idea of original intention widely misses the intentions of our founding fathers when they drafted the Constitution as a "living document." Bork conveniently ignores that our founding fathers wrote "Some men look at constitutions with sanctimonious reverence, and deem them too sacred to be touched. . ., but . . .Constitutions must go hand in hand with the progress of the human mind." (Thomas Jefferson in his "Earth Belongs to the Living - the Dead Shall Not Rule From the Grave"

letter). As the Living Document progressed, the Honorable Benjamin Cardoza eloquently wrote "A Constitution states principles for an expanding future, not specifics for the passing hour." By focusing narrowly on strict literal interpretation, Judge Bork is too willing to overlook the obvious general nature of most constitutional phrasing and conclude that absent specific words the framers intended government to have sweeping powers to regulate personal behavior.

The framers of our Constitution gave the Supreme Court the ultimate determination of governmental power and scope of individual rights. The notion that the "framers" wrote a Constitution that is capable of but one interpretation, referred to by Judge Bork as "original intention", meant to last without variance for all time to come, is erroneous. Both Madison and James Wilson (Wilson, a Philadelphia lawyer, originated the electoral college) expressed the fear that enumeration of particular rights might be erroneously construed by some to mean that other rights were not protected by the Constitution. The Constitution was not drafted as a legal document in the sense of being a compilation of all the rights and obligations of all parties forever after. It was drafted as a statement of general principles delegating to future generations the task of discerning and applying these principles in light of future needs and experience.

This history lesson is not only interesting, but important to the issue at hand because Judge Bork's belief in the buzz words "original intent" manifest that his judgment not only contradicts the framers of our Constitution, but also is outside the mainstream of established judicial thought.

Judge Bork is on record criticizing numerous Supreme Court cases as being "unprincipled" and "lacking intelligence." Such statements reveal his lack of commitment to stare decisis, or court precedent. Robert Bork simply does not support the basic, longstanding and consensus principles of our nation. As Justice Holmes repeatedly stated: "A page of history is worth a volume of logic." (See Lochner v. N.Y. 198 US 45 (1905).

Robert Bork's self-proclaimed judicial deference to the Constitution and to the legislature fades dramatically when values differ. In the antitrust area, his judicial primacy casts a shadow over the legislative history of the antitrust laws. Here Judge Bork's market impulses collide with his self-proclaimed belief in judicial restraint. It is intellectually difficult, if not impossible, to reconcile Bork's judicial activist views in the antitrust arena with his alleged views on the general need for judicial restraint.

Judge Bork argues that all twentieth century antitrust statutes are irrational because they do not advance economic efficiency. Whether or not we agree with his antitrust policies is not at issue. What is at issue is Robert Bork's judicial integrity which is flawed by his disregard for legislation with which he disagrees, while he states absolute adherence to legislative intent and to the legislative process in other areas.

In his September 17, 1987, testimony before this Committee, Bork noted that antitrust statutes are "imprecise", and stated, "As economic understanding progresses, this rule must evolve." In his book, The Antitrust Paradox, Judge Bork stated:

"Even in statutory fields of law, Courts have obligations other than the mechanical translation of legislative will." (Paradox, p. 72). Mr. Bork should follow his own advice when reading and applying our Constitution.

Robert Bork's judicial economic activism argues that constitutional protection against government interference with property is more firmly rooted in the intent of the framers than are many of the civil liberties protected by the Supreme Court. We disagree. **WE THE PEOPLE** adhere to John Locke's and to the "framers'" principles of government which state that the **BLESSINGS OF LIBERTY** include an individual's right to **SECURITY OF PERSON**, as well as property. Judge Bork's inconsistency in applying judicial restraint destroys his credibility and therefore places his judicial integrity in question. Judge Bork's lack of commitment to Supreme Court precedent places him outside the judicial mainstream and therefore places his judgment in question.

The framers of our Constitution set this country on a path to a more open form of government, to a system distrustful of power, and to a promise of liberty. The work of completion is, at least in major part, a task for the Supreme Court. We ask for a Justice who believes in this on-going task.

We cannot uphold our individual attorney's oath to **our** Constitution and support the nomination of Judge Bork. We urge the Senate to oppose his appointment to the Supreme Court.

Linda E. Christensen, Esq.

STATEMENT OF THE NATIONAL COUNCIL OF JEWISH WOMEN
Lenore Feldman, President

Submitted to the U.S. Senate Committee on the Judiciary

The National Council of Jewish Women, the oldest Jewish women's organization in America, opposes the nomination of Robert Bork as Associate Justice to the Supreme Court. NCJW represents 100,000 active community volunteers and leaders in 200 communities nationwide. Opposing the nomination is unprecedented for us, but we feel that we have no choice, considering our deep and long term commitment to preserving individual liberties.

NCJW believes that Robert Bork's majoritarian view of the Constitution threatens the hard won rights of Americans, especially those for whom the Bill of Rights protections were intended. After listening to Judge Bork testify at the Judiciary Committee hearings our reservations have solidified.

Individual liberties and the rights of minorities, whether to worship or not worship as one chooses, speak an unpopular opinion without fear of reprisal, or be guararteed basic civil rights, are the principle factors that convinced NCJW to oppose this nomination.

NCJW has a long and proud history of anti-censorship activities. How could we support a nominee who does not assure that all speech, including unpopular opinions, are protected?

NCJW has a long and proud history as civil rights activists. How could we support a nominee who was against integration of public facilities because of a belief that the majority has the privilege of choosing whom to associate with, but not the minority? How could we support a nominee who found poll taxes acceptable, when these taxes prevented minorities and the poor from exercising their right to vote? How could we support a nominee who found many of the Supreme Court's twentieth century civil rights decisions without merit?

NCJW has a long and proud history as advocates of the right to privacy. We have supported family planning and reproductive rights services since 1930, the right to abortion since 1967, and the right to privacy in sexual relations between consulting adults since 1979. How could we support a nominee who finds no constitutional merit in the right to privacy?

And of course, NCJW has a long and proud history of advocating for religious freedom and separation of church and state. How could we support a nominee whose position is contrary to this belief? Religion in public schools and religious symbols in public life are unacceptable to us.

The Senate Judiciary Committee hearings clarified Judge Bork's philosophies of Doctrine of Original Intent and "neutral principles", and in doing so reaffirmed our opposition. NCJW questions Judges Bork's ability to adhere to the Doctrine of Original Intent, and yet alter his long time, written positions on the first and fourteenth amendments, which are based upon the doctrine. NCJW questions Judge Bork's rigid interpretation of the letter of the law, while ignoring the spirit of the law. NCJW questions Judge Bork's use of "neutral principles" to support constitutional changes and expansions for economic rights, and at the same time using the principles to deny individual rights.

The framers of our constitution created a democratic republic in which all people, both majority and minority, would be treated fairly and equally under the law. We worry when a nominee for the Supreme Court can use the smoke screen of original intent, while in reality, ignoring original intent. NCJW is committed to guaranteeing that the rights of all Americans do not become the privileges of a chosen few, and therefore we oppose the nomination of Robert Bork to the Supreme Court.

NATIONAL EDUCATION ASSOCIATION • 1201 16th St., N.W., Washington, D C 20036-3290 • (202) 822-7300

GOVERNMENT RELATIONS
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DON CAMERON, Executive Director

October 1, 1987

The Honorable Joseph Biden
Chairman, Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Chairman Biden:

As we discussed, the National Education Association is pleased to submit our testimony in opposition to the nomination of Judge Robert Bork. We appreciate your inclusion of this testimony in the hearing record.

The men and women who work in America's public schools are deeply interested in and affected by this nomination. We are distressed by his views and actions in such areas as basic human and civil rights, free speech and academic freedom, separation of church and state, equal opportunity and school desegregation, employee and union protections, and privacy rights.

After careful consideration of his record, we find Judge Bork lacking in the essential qualities necessary in a Supreme Court Justice. We urge the committee to reject his nomination.

Sincerely,

Ken Melley

Kenneth F. Melley
Director of Government Relations

KFM/mew

enclosures

STATEMENT

OF THE

NATIONAL EDUCATION ASSOCIATION

ON THE

NOMINATION OF ROBERT BORK

TO THE U.S. SUPREME COURT

SUBMITTED TO THE

COMMITTEE ON THE JUDICIARY

U.S. SENATE

OCTOBER 1, 1987

Mr. Chairman and Members of the Committee:

The 1.86 million-member National Education Association appreciates the opportunity to speak to you on an issue of profound importance to the future of our nation and our public schools.

During the confirmation hearings on Robert Bork, this Committee has grappled with many of the most fundamental questions of our time. While Americans are celebrating the bicentennial of the U.S. Constitution with balloons, parades, and speeches, this panel has been engaged in a critical analysis of complex principles that are at the very heart of our nation's Constitution.

We know that you are well aware that your vote on the nomination of Robert Bork is not a decision to be taken lightly. This decision is as unique and enduring a responsibility as any this Committee or this Congress will undertake.

The investigation and debate of this Committee involves much more than just a nomination or just the views of a particular individual. Ultimately, your action will set the path for judicial, public, and social policies for generations to come. The investigation and debate of this Committee is not just an exercise in intellectual musings; it is a matter of life and death, of liberty and tyranny, of justice and iniquity.

Your action on this nomination will have both a substantive and a symbolic impact. We ask you to consider the message the elevation of Robert Bork to the Supreme Court would send to those who are engaged in the struggle for full equality, for equal protection. What message will it send to those of our nation for whom the rights to free speech, privacy, and religious liberty are the most cherished bases for national pride?

The National Education Association has a deep interest in these matters. Our members have a longstanding commitment to justice, equality, and liberty, and we know well that each generation must renew the national commitment to these ideals. Moreover, we have practical concerns. We are deeply concerned about how a Justice Bork might rule on matters affecting public education institutions and public education employees at every level. Robert Bork's views of the rights of the government and

the rights of employers to intrude into the lives of individuals cause our members great apprehension, because for education employees the state is the employer.

Our members have deep reservations about Robert Bork's views on a wide range of issues because the public schools have been a testing ground for many complex constitutional issues. Public school employees, postsecondary faculty, and students, young and old, take to heart the rights guaranteed by the U.S. Constitution: the rights of free speech, of due process, the separation of church and state, and equal protection under the law.

We believe the courts have a fundamental responsibility to enhance and expand liberty wherever possible. Yet Judge Bork's record — and his expressed views — show a clear preference for scaling back individual freedoms and for expanding the power of the state.

We cannot afford to stand still in the pursuit of liberty. If we do not move forward in expanding individual rights, we will move backward. If we do not exercise our rights, we will lose them.

We who work in America's public schools have a particular sensitivity to the importance of maintaining and expanding individual liberty. It required a long struggle for us to gain the rights other citizens enjoy. Moreover, our members are engaged in the business of transmitting an awareness of our constitutional heritage to the next generation and in helping students gain the skills they will need to exercise and defend their freedom.

The Struggle Continues

There is today a concerted effort to repress academic freedom, to reinstate sectarian practices in the schools, to limit the free speech rights and due process rights of both students and education employees, and to dismiss equal opportunity. The struggle is not over. It must continue.

The struggle must continue for equal opportunity. Many today act as if the civil rights movement is an historical event, a process that was completed 10 or 20 or 30 years ago. It was not. Despite Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954) — which Judge Bork has praised — and Bolling v. Sharpe, 347 U.S. 497 (1954) — which Judge Bork has attacked, we are not a fully integrated society. Despite the best intentions of the Congress and the courts, the only way many students gain access to a quality education is through rigorous civil rights enforcement. Prejudice is waiting at the gate for us to relax our guard.

The struggle must continue for academic freedom. The headlines of the nation's leading newspapers put a spotlight on a number of highly visible censorship cases. But at the same time, many books are quietly pulled from the shelves and tossed in the fire — books that are not pornography, not seditious, books that we all know and love. Ignorance is waiting at the gate.

The struggle must continue to protect rights of due process. For more than 130 years, NEA has worked toward our goal of a qualified teacher in every classroom. We have never wavered from that goal. Yet there are those who believe the only way to achieve that goal is to limit the due process rights of school employees. Iniquity is waiting at the gate.

The struggle must continue to maintain the wall of separation between church and state. NEA believes that families and religious institutions, not public schools, are proper institutions for the transmission of spiritual values. Yet there are those who would have the public schools become an annex to the church. Religious intolerance is waiting at the gate.

The struggle must continue to protect the right of privacy. NEA believes that public school employees should have the same rights as other citizens to make personal decisions about their private lives, including the right to decide whether to have children, to use contraceptives, to marry, or to divorce. Yet there are those who believe that public employees forfeit that right. Government intrusion is waiting at the gate.

These issues — equal opportunity, freedom of speech, due process rights, equal protection — are not shades of the past. They are fundamental issues of our time. How our society acts today will have far-reaching implications for our schools and our society far into the future.

On each and every one of these issues, Judge Bork has written, spoken, or ruled in a way precisely opposite to prevailing judicial thought and opinion. His justification for narrowing the scope of particular clauses, while broadening the scope of others, has been that prevailing thought is in variance with the framers' original intent.

Original Intent

Judge Bork has written (in the context of libel) that a ''judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty,'' (Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984). And yet his record, writings, and public statements demonstrate that Robert Bork applies a variable standard to different provisions of the Constitution, narrowing or widening the scope of various articles and clauses to fit his judicial philosophy.

Judge Bork finds rationalization for his attacks on long-standing Supreme Court rulings and standards under the umbrella of ''original intent.'' Claiming adherence to ''original intent'' is a way of claiming some special link with the framers of the Constitution and excoriating all others as willful distorters of the objective truths laid down 200 years ago. All readers of the Constitution — to some degree — bring their own subjective values to its interpretation. We reject the idea that Judge Bork has some apostolic link to the framers that lends greater weight to his interpretation than that of the Justices he has lambasted throughout his career.

In his hands, ''original intent'' is a gloss for forgetting history, denying present circumstances, and dismissing previous actions of the Court.

Judge Bork has attempted to assure this Committee that he would not reverse or ignore Supreme Court rulings on such essential matters as free speech. And yet, it is hard to imagine a man of principle not being swayed by his own lifetime of ideas when he addresses a problem. Even if one accepts his assertion that — in some circumstances — he will let stand previous rulings, there is absolutely no assurance that he will, when a similar case appears, adhere to principles the Court has laid down for judging those cases.

Equal Protection

Judge Bork's view of the scope of the Fourteenth Amendment is deeply disturbing. He has testified that only racial discrimination merits a test akin to ''strict scrutiny'' and that all other cases are subject to a ''reasonableness'' test. In his explanations before this Committee, he used one example — women in combat — as an unreasonable application of the equal protection clause, and implied that there are many other reasonable justifications that could be found for making legal discriminations between men and women. Judge Bork completely rejects the three-tier level of scrutiny currently used by the Supreme Court to determine whether a statute is in violation of the Equal Protection Clause. A reasonable or rationale basis

test provides the lowest level of protection against individual discrimination and is the most subjective basis for making a judgment. We find this troubling in light of the fact that earlier in his career he found reasonable, principled, and — to his mind, moral — arguments for racial discrimination in public accomodations (''Civil Rights — A Challenge,'' New Republic, August 31, 1963), housing (''Neutral Principals and Some First Amendment Problems,'' 47 Indiana Law Journal 1, 1971), and other areas.

We are no more reassured by his views on school desegregation. While Judge Bork has stated that Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954), properly reversed Plessy v. Ferguson, 163 U.S. 537 (1896), it is the only instance we can find where he acknowleges that social change can justify a broad reinterpretation of the law.

Equally troubling is his view on Bolling, which resulted in the desegregation of the public schools in the District of Columbia. Bork's rejection of Bolling is an assertion that the Fifth Amendment does not prohibit discrimination — even discrimination based on race — by the federal government.

Public school students must have recourse to a Supreme Court that will be open to arguments demonstrating that certain educational policies can, in fact, be discriminatory. And they must have recourse to a Supreme Court and a Congress that has the power remedy discrimination.

In addition, each year, NEA is involved in numerous cases in defense of our members or in cases involving other public employees, that affect the rights of our members. A large share of the NEA cases that reach the federal courts rest on the basis of equal protection principles according to the long-standing, prevailing judicial view of the scope of the Fourteenth Amendment. Judge Bork would clearly be disinclined to consider, much less rule in favor of, discrimination cases relying on the equal protection clause.

Moreover, given Judge Bork's constricted view of the Fourteenth Amendment and his reliance on ''original intent,'' his confirmation would jeopardize the continued vitality of rulings such as Board of Regents v. Roth, 408 U.S. 562 (1972), in which the Supreme Court determined that under the Fourteenth Amendment tenured school employees have the right to due process in dismissal matters.

We do not seek any guarantees from a nominee to the Supreme Court on his or her rulings. Rather we believe a Supreme Court nominee should be open to arguments intended to protect individuals against discrimination on the basis of sex, handicap, religious belief, and other grounds.

Free Speech

We have grave reservations about Judge Bork's views regarding the free speech rights of public employees and his view on whether there is a constitutional basis for academic freedom.

As employees of the state, public school employees have deep concerns about their rights to exercise protected free speech. In recent history, education employees have been fired for participating in school board races and other political activities. Even today, by law and by policy, state and local governments attempt to limit the right of public employees to speak out on matters of public interest. In general, the Supreme Court has upheld the rights of our members to engage in protected free speech. But we feel justifiably threatened by the nomination of a person who has a longstanding record of upholding the right of the state to limit that freedom.

In a 1984 speech before the Judge Advocate General's School, Bork clearly articulated his view of a state's interest in setting strict limits on public employees' speech: ''The view that the first amendment guarantees a right of self-expression makes it more difficult to justify restrictions on the speech of military personnel and government employees.'' Judge Bork's philosophy stated in this speech clearly runs counter to existing Court standards upholding the rights of public employees to speak out on a wide range of issues, including matters of political and social interest.

Judge Bork's views on Constitutional protection of literature, art, and other forms of expression at the ''outer edge'' cause the NEA deep trepidation about his confirmation.

The public schools are, at present, under attack from many quarters over issues of academic freedom. In Judge Bork's words, ''It is sometimes said that works of art...are capable of influencing political attitudes. But...(they) are not on that account immune from regulation,'' (''The Individual, the State and the First Amendment,'' unpublished speech, University of Michigan, 1978). Most of the books and other materials challenged in the public schools today are neither political nor obscene, and yet critics charge that certain books, such as The Wizard of Oz, The Diary of Anne Frank, and Of Mice and Men, advance the so-called religion of secular humanism. The Supreme Court's actions in area of educational textbooks and materials over the next few years will play a major role in determing the scope of information to which America's public school students will have access.

In particular, Judge Bork has questioned (in a question/answer session following a speech to the Federalist Society, 1982) the judicial philosophy behind Board of Education v. Pico, 457 U.S. 853 (1982), which held that under the First Amendment school officials could not remove a book from a school library if their motive was to suppress the ideas found in the book.

Judge Bork's view of the First Amendment would diminish the Supreme Court's role in protecting public school employees against the arbitrary suppression of free speech rights by local school boards, and could ultimately limit students' access to knowlege.

Right to Privacy

Judge Bork has been highly critical of Supreme Court decisions defining and upholding a right to privacy.

A constitutional right of privacy is established by a large body of law protecting the right of individuals to make certain personal decisions about their lives. The right of privacy is of special interest to public school employees given a long history of arbitrary actions by school administrators and repressive and intrusive school board policies based on a rationale that school employees are a role model for their students. Within this century, school employees were forbidden from such activities as public hand-holding or going to the ice cream parlor on Sundays.

More recently school boards fired teachers — using the same role model rationale — for becoming pregnant, Avery v. Homewood City Bd. of Ed., 674 F2d 337 (5th Cir. 1982); for instituting divorce proceedings, Littlejohn v. Rose, 768 F.2nd 765 (5th Cir. 1985); and for dating someone disapproved by the local school board, Schreffler v. Bd. of Ed., 506 F. Supp. 1300 (D. Del. 1981). The courts are the ultimate protection these individuals have against arbitrary dismissal, demotion, reassignment, or other adverse action.

Although Judge Bork attempted to modify some of his more extreme positions during his testimony before this Committee, he has held firm to the position that there is no Constitutional basis for the Supreme Court to protect an individual's right of

privacy. Elevating Judge Bork to the Supreme Court would seriously undermine the right of privacy to the detriment of public schools and their employees.

Separation of Church and State

There is no judicial record demonstrating how Judge Bork has ruled on cases involving the religion clauses of the First Amendment, but his views on a wall of separation of church and state are clear.

Judge Bork's view that the phrase ''Congress shall make no law respecting an establishment of religion...'' protects only against the establishment of a single, official sect goes against not only longstanding Supreme Court intepretation of the clause, but it goes against the text itself. If Judge Bork's view that the ''first amendment was not intended to prohibit the nondiscriminatory advancement of religion, so long as religious belief was not made a requirement in any way,'' (''Religion and the Law,'' unpublished speech, University of Chicago, 1984) were correct, then the religion clause would be redundant in light of Article VI.

In the hearings before this Committee, Bork has attacked the three-prong test for determining violations of the establishment clause, which provides ''First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, and...finally, the statute must not foster 'an excessive government entanglement with religion,''' Lemon v. Kurtzman, 403 U.S. 602, 612-3 (1971), quoting Walz v. Tax Commission, 397 U.S. 664 (1970).

Judge Bork has criticized recent Supreme Court decisions regarding religion and the public schools, including Aguilar v. Felton, 473 U.S. 402 (1985), striking down the use of public funds to pay teachers in religious schools, Engel v. Vitale, 370 U.S. 421 (1962), holding that public school officials may not require students to recite a state sanctioned prayer at the start of each school day, and Wallace v. Jaffree, 105 S.Ct. 2479 (1985), striking down an Alabama statute mandating a moment of silent prayer.

Judge Bork gives every indication that, if confirmed, he would vote to reinstate state-sponsored prayer and other religious activities in the public schools and to permit the use of public funds to support sectarian schools.

Other

There are many other areas of the law where Judge Bork is diametrically opposed to prevailing judicial philosophy. In 1972, Bork testified before Congress in support of proposed legislation that would have drastically curtailed the power of federal courts to remedy school segregation. He has authored a scathing attack on the Supreme Court's decision in University of California Regents v. Bakke, 438 U.S. 265 (1978). As a federal appeals court judge, Bork has ruled that unions may not refuse to bargain over an employer proposal to narrow the scope of the grievance and arbitration procedure AFGE v. FLRA, 778 F.2d 640 (D.C. Cir. 1983), and, conversely, ruled that a federal agency employer could refuse to bargain over a union proposal to extend the scope of the grievance and arbitration procedure, AFGE Locals 225, 1504 and 3623 v. FLRA, 712 F.2d 640 (D.C. Cir. 1983); and he has upheld the U.S. Postal Services decision to cancel voter registration drives mounted by postal workers' unions, American Postal Workers Union v. U.S. Postal Service, 764 F.2d 858 (D.C. Cir. 1985).

In Vinson v. Taylor, 760 F.2d 1330, (D.C. Cir. 1985) (dissent from denial of rehearing en banc), aff'd, 106 S.Ct. 2399 (1986), Judge Bork argued that Title VII of the 1964 Civil Rights Act may not protect women against on-the-job sexual harassment, a view that is not shared by Chief Justice Rehnquist.

In these and many other rulings he has shown his preference for employers over employees, his hostility toward affirmative action as a means of rectifying past discrimination, and other anti-worker, anti-minority, and anti-individual attitudes.

Conclusion

After careful review of his record, and of his testimony before this Committee, we find Robert Bork sadly lacking in the essential qualities necessary in a Supreme Court justice in 1987.

Judge Bork is outside the mainstream of American judicial thought and the beliefs and ideals of the American people. He would break faith with history — with decades of constitutional, judicial, and legislative reasoning — and in so doing, break faith with our generation's promise to the future.

Judge Bork demonstrates a callous disregard for basic areas of principle, areas that serve as the thread which holds the fabric of America together. Judge Bork demonstrates a fundamental misunderstanding of the rule of law and its essential nature in safeguarding the rights of all of our citizens. Judge Bork lacks sensitivity to the rights of the minority, and thus could bring us terribly close to a tyranny of the majority.

Judge Bork's views on privacy undermine longstanding public policy. More important, his views on the rights and powers of government could lead us to pernicious intrusion by the state. We would think his support for powerful, pervasive institutions should trouble conservatives as much as it does those on the opposite end of the political spectrum. His views of the state are of particular concern to public school employees whose employer is the state.

Despite his rhetoric of judicial restraint, it is clear that he has no qualms about judicial activism when it can achieve his ends. Despite his rhetoric about adherence to a judicial philosophy, it is clear he is not a purist. Despite recent reformulations, recantations, and rehabilitation of his statements and judicial record on such critical issues as the scope of free speech, equal protection, and adherence to Supreme Court precedent, we remain convinced that Judge Bork could wreak severe and lasting damage to our nation.

Mr. Chairman, we have searched out the proceedings of these hearings in an effort to discover some reassurance that Judge Bork will carry on the historical and constitutional responsibility of the Supreme Court as the last resort for the weak and unprotected. We cannot find that reassurance.

An appointment to the U.S. Supreme Court is an appointment for life. There are no guarantees. There are no second thoughts.

The issue facing you and the Senate as a whole is not one of conservatism or liberality. It is matter of justice.

We urge you to reject the nomination of Robert Bork.

NFPRHA National Family Planning and Reproductive Health Association, Inc.

TESTIMONY OF

SCOTT R. SWIRLING

ON BEHALF OF THE

NATIONAL FAMILY PLANNING AND

REPRODUCTIVE HEALTH ASSOCIATION

IN OPPOSITION TO

THE NOMINATION OF JUDGE ROBERT H. BORK TO THE

THE UNITED STATES SUPREME COURT

BEFORE THE SENATE JUDICIARY COMMITTEE

MONDAY, OCTOBER 5, 1987

Mr. Chairman and Members of the Committee:

I am Scott R. Swirling, Executive Director of the National Family Planning and Reproductive Health Association, Inc. (NFPRHA). On behalf of the association and its members across the country, I strongly urge this committee to reject the nomination of Judge Robert H. Bork to the position of Associate Justice of the United States Supreme Court.

The National Family Planning and Reproductive Health Association (NFPRHA) is a non-profit membership organization established to improve and expand the delivery of voluntary family planning and reproductive health care services throughout the United States. As the only national organization representing the entire family planning community, from consumers to state, county and local health departments; from hospital-based clinics to affiliates of the Planned Parenthood Federation of America; from umbrella funding councils to independent, free-standing family planning clinics and individual health care professionals, NFPRHA is committed to establishing and maintaining reproductive health care as a priority in this country.

[illegible] N.W., Suite 380, Washington, D.C. [illegible] (202) 628-3845

NFPRHA wants to express in the most forceful and unequivocal terms our strong opposition to the views of Judge Robert Bork. Those views are far outside the mainstream of principles of fairness and decency acceptable to most Americans. The nomination of Judge Bork to the highest court in the land poses a serious threat to the Constitutional protections of individual privacy and to the gains in the rights of minorities and women. Judge Bork's beliefs -- which ultimately may be turned into law if he is confirmed -- are inimicable to reproductive freedoms and to the concepts of equal representation under the law.

Judge Bork has categorically rejected any Constitutional basis to the right to privacy. The right to privacy is the cornerstone of reproductive freedom, allowing access by all individuals to family planning services, contraceptives, and abortion. If Judge Bork should be confirmed, Federal constitutional protection of reproductive freedoms will be jeopardized.

The Constitutional right to privacy has been long established by judicial ruling. Judge Bork has stated his opposition in the 1983 "Squeal Rule" case (National Family Planning and Reproductive Health Association vs. Department of Health and Human Services and Planned Parenthood Federation of America vs. Heckler).

NFPRHA filed suit to prevent implementation of regulations issued by the Department of Health and Human Services to require parental notification when an unemancipated minor received prescription contraceptives and other services from family planning clinics funded under Title X of the Public Health Service Act. In his dissenting opinion, Judge Bork belied his claim that he believes in "judicial restraint." While agreeing that the regulations were invalid as written, he wrote at great length as to how DHHS could re-write the regulation to pass judicial muster.

Judge Bork's writings imply that governments are permitted to tell married couples that they cannot use contraceptives (Griswold vs. Connecticut, 1969). Judge Bork has called Griswold "an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it." The Supreme Court afforded women and men this important constitutionally-based freedom from state interference in an area central to their ability to control their own lives.

On the landmark case of Roe vs. Wade, the 1973 Supreme Court ruling that allows women the choice to seek an abortion as an option to an unintended pregnancy, Judge Bork has stated, "I am convinced, as I think most legal scholars are, that Roe vs. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority."

On issues pertinent to public health and welfare, Judge Bork has analyzed statutes inconsistently, finding no Congressional authority to protect women's health, as illustrated in the case of

Oil, Chemical & Atomic Workers International Union vs. American Cyanamid Company. Since American Cyanamid could not control the toxic levels of lead in one of its divisions, the company established a "policy" for women of childbearing age (19-50) who worked: the option to quit or to be sterilized. Judge Bork concluded that American Cyanamid's "policy" referred to "surroundings" and, therefore, was permissible under the Occupational Safety and Health Act. It is reprehensible that Judge Bork upheld the position that the Constitution does not protect women against mandatory sterilization and would disallow employment to women who could not prove they had been sterilized.

Judge Bork's writings and judicial opinions make a compelling argument against his confirmation to the United States Supreme Court. His appointment would roll back the clock and erase years of progress in individual and civil rights. The nomination of Judge Bork insults every good and decent advance our country has made toward a more open, equal, and democratic society in the past 30 years.

There is no place for an extremist on the nation's highest court. The views and judicial opinions of Judge Robert H. Bork are well-documented and contrary to the beliefs of America. Others who have testified before the Judiciary Committee have made this clear in their extensive discussions in opposition to Judge Bork's nomination. These decisions clearly indicate that he is a thoroughly political, partisan right-wing judicial activist that will pursue his own ideological and political agenda. Judge Bork will tilt the Court sharply to the right -- providing the vote to reverse key decisions -- on civil rights, abortion, school prayer, and other social issues. The appointment of Judge Bork to the Supreme Court would allow the Reagan Administration to leave an irreversible conservative legacy that would be detrimental to those traditional constitutional protections which are essential to the preservation of reproductive rights.

In sum, NFPRHA goes on record in opposition to the nomination of Judge Robert H. Bork to the United States Supreme Court.

STATEMENT OF HAYWOOD BURNS

PRESIDENT

NATIONAL LAWYERS GUILD

BEFORE THE SENATE

JUDICIARY COMMITTEE

ON THE NOMINATION

OF ROBERT H. BORK TO

THE UNITED STATES SUPREME COURT

The nomination of Robert H. Bork to the United States Supreme Court poses a critical and momentous challenge to our Constitutional scheme of political and democratic rights. Judge Bork's views on the most significant contemporary constitutional issues are in radical opposition to well settled doctrine and, if implemented, would reverse much progressive development in Constitutional adjudication in the past 50 years. In every important area of constitutional law, Judge Bork has articulated a judicial philosophy that is dominated by right-wing political ideology. As much as he professes to rely on doctrines of judicial restraint, respect for the political democratic process, and the theory of "original intent," his Opinions demonstrate an extreme and untenable political one-sidedness. In light of his record the National Lawyers Guild emphatically opposes his nomination to the Supreme Court.

The NLG is an organization of 9,000 members that has for 50 years worked for the ideals of justice, equality, fairness and human dignity. We have supported: the struggles of blacks, hispanics, women and other minorities to achieve full and equal citizenship; working men and women in their efforts to achieve the basic right to organize into unions, to bargain collectively and to a fair wage and safe working environment; the rights of gays and lesbians to equal protection of the laws and to be free from the imposition of intolerant legislatures' moral views; the rights of the accused to due process and the right for all

citizens to be free from arbitrary and coercive police practices; the full protection of our rights to free expression, association and political change; and the independence of lawyers who challenge governmental policies.

We are proud to represent the many lawyers who are involved in the constant struggle to achieve a fair, just and equitable society and we are proud to have played a role in protecting the rights of those courageous people who have participated in the great social and legal struggles of our times.

In our view the Supreme Court has an indispensable historical function: the protection of individual liberties from discriminatory, arbitrary or capricious governmental action. The Court has not always fulfilled that role and at times has failed to vindicate the promises of the Constitution. Indeed, 200 years after the adoption of the Constitution, the great concepts of Due Process, Equal Protection and Democratic Rights, are still not guaranteed to all of our citizens. But Judge Bork's vision of America is so drastically different from even the now prevailing conservative judicial norms, that his critical vote would inevitably return us to the dark ages of constitutional law.

The extreme ideological views Judge Bork has stated over the years are considered in the following sections.

1. General Judicial Philosophy

Judge Bork has stated that in a society committed to majority rule, the federal judiciary has legitimacy to intervene in the democratic process only when it can base its intrusion on a "neutral" and narrowly-drawn principle. According to Judge Bork this theory of judicial review represents "neutral", value-free choices, while all who contend otherwise are unprincipled and activist. But judicial review is ultimately informed by certain value choices. Bork's "neutral" principles, as demonstrated by his Opinions, are a cover for a personal judicial philosophy that denigrates the central role of individual rights and the importance of judicial review and free

access to the courts to protect and vindicate Constitutional liberties.

Judge Bork acts with judicial restraint only where such a stand will lead to a politically conservative result. He becomes an "activist" judge where his ideology so dictates. For example, his record with regard to issues involving business interests, workers, consumers and environmental issues unequivocably demonstrates the ideological nature of his judicial philosophy and puts the lie to his claim of judicial restraint. Since 1982 he has voted for business interests in all eight nonunanimous decisions in which he has participated in the Court of Appeals involving lawsuits by businesses against the government.

By contrast he voted in favor of the executive branch in all seven nonunanimous cases in which public interest groups challenged regulations issued by federal agencies. These cases involved environmental issues, broadcast licensing regulations, rules for family planning clinics and regulation of potentially carcinogenic coloring.

Judge Bork has also voted against individuals and public interest groups in all 16 nonunanimous cases that came before him on the question of whether they had a right to "access" -- that is, to bring claims before the courts or federal administrative bodies. Taken together, Judge Bork's decisions in the fields of administrative, constitutional and criminal law and his rulings on access present a clear theme: where anybody but a business interest challenged executive action on statutory or constitutional, Judge Bork exercised "restraint" by refusing to hear the challenge or deferring to Executive power. But he was an unabashed judicial activist where business was the plaintiff.

The hypocrisy of these decisions is reflected as well in Judge Bork's views concerning the right of the state to legislate "morality." In 1963 he stated that the Civil Rights Act was unconstitutional because:

> The proposed legislation, which would coerce one man to associate with another on the ground that his personal preferences are not respectable, represents such an extraordinary incursion into individual freedom, and opens up so many possibilities of governmental coercion on similar principles, that it ought to fall within the area where law is regarded as improper.

Yet he has just as emphatically declared that the majority has the power to discriminate on the basis of social preferences merely because the majority believes such is "morally wrong." As Ronald Dworkin has pointed out: "it is hard to resist [the] conclusion that [Bork's] principles adjust themselves to the prejudices of the right, however inconsistent these might be."

2. The First Amendment and Free Speech

In an Indiana Law Journal Article (1971) Judge Bork gave a view of the First Amendment that is contrary to the most settled and widely accepted construction of the First Amendment. He stated that applications of "neutral principles" should lead to an interpretation of the First Amendment limiting its application to purely political speech. Discussion of matters like science and art would be unprotected. No Justice in the past 30 years has expressed views anywhere near those of Judge Bork's with respect to free speech. And while Judge Bork now says that other matters may be protected as legitimate concerns of the first amendment, he has not changed his views to any great degree. For example, in Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986), Bork displayed his usual tendency to side with governmental power at the expense of individual constitutional rights. In this case, protestors challenged a D.C. ordinance that prevented them from carrying placards outside the Soviet and Nicaraguan embassies in the District of Columbia. Judge Bork upheld the statute in a decision that expressly allows censorship based on the content of speech. Judge Patricia Wald dissented, writing that

> [W]e must not too hastily surrender our free speech birthright to the phantom national security interests and internation obligations...[despite] the amorphous need to prevent affronts to the "dignity" of the embassy...we must adamantly protect free speech and the right to political dissent, not just about our own country's but about other countries' policies.

In a 1984 lecture to the American Enterprise Institute, Bork criticized a Supreme Court decision which upheld a young man's right to wear a shirt with a political slogan on the basis that the Court improperly applied the First Amendment. He contended, "In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge." One must ask: what role does the Constitution play?

Bork would also to limit access to information anytime the government contends it has a foreign policy interest in withholding information. He took this position in Abourezk v. Reagan, an important case currently pending before the Supreme Court involving the State Department's authority to deny visas to foreign visitors who have controversial viewpoints or represent controversial governments.

3. Civil Rights

In 1963 Bork opposed provisions of the Civil Rights Act that would require the desegregation of public facilities. Bork has recanted this view, but the Senate should not overlook the fact that at a pivotal point in history when basic constitutional protections were about to be given the force of law, Bork was outspoken in his opposition to such progress.

Moreover, throughout his career, Bork continued to oppose rights and remedies for racial discrimination. He remained unchanged in his views about several other important civil rights concerns raised in the 1973 hearings on his nomination as Sclicitor General. He rejected the "one man, one vote" formula set forth in Reynolds v. Sims (1964) as "too much of a straight jacket" and without "theoretical basis." He challenged Harper v. Virginia Board of Elections, in which the Supreme Court struck down the poll tax as unconstitutional, as a decision not properly based on principles of equal protection. When questioned further by Senator Tunney about his current feeling whether Harper had been correctly decided in light of its impact upon the welfare of the nation, Bork cavalierly replied,

> I do not really know about that, Senator. As I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other.

Bork's views stem from his narrow interpretation of the equal protection clause, which he refers to in a 1971 Indiana Law Journal article as the "Equal Gratification" clause. Bork wrote that the clause requires "formal procedural equality" and that "government not distinguish along racial lines. But much more than that cannot properly be read into the clause." This view would repudiate use of the Fourteenth Amendment to protect women and other non-racial minorities from discriminatory treatment.

4. Privacy

Judge Bork's opposition to Roe v. Wade, is based on his deeper opposition to an earlier line of cases, starting with Griswold v. Connecticut, 381 U.S. 479 (1965), that established a constitutional right to privacy. The Griswold decision was justified on the basis that a zone of privacy was inherent in the First, Fourth, Fifth and Ninth Amendments. Judge Bork finds the Griswold decision lacking in principle because a privacy right is not explicitly dictated by any specific clause of the Constitution.

Thus, not only would a Bork appointment endanger the fundamental right of a woman to choose an abortion, but his views would utterly negate the right of privacy of the American people. It is inconceivable that in a society where governmental and other forces can so easily undermine and destroy human individuality, privacy, and autonomy, that we would permit the Constitution to be stripped of this fundamental protection.

5. Access to the Courts

In the name of judicial restraint Judge Bork would close the federal courthouse doors to individuals and groups whose rights have been violated and who have no other recourse to redress their grievances. It is, of course, no secret that a powerful means of effectively eliminating constitutional rights and guarantees is to prevent those whose rights have been violated from even presenting their claims to a federal court. Unfortunately, in recent years the Court has limited access

through the doctrines of standing and federalism, but hardly with the vengeance that Judge Bork brings to this issue.

As noted earlier in sixteen cases in which he has participated in which this issue has been presented, he has voted to deny access in every case. Included are cases involving important constitutional questions: a claim of non-custodial parents to visit their children; a claim by the homeless to challenge shelter closings; a claim by workers challenging discrimination against older workers and retirees; and a claim by refugees raising due process issues in immigration matters.

In VanderJagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983) and Barnes v. Kline 759 F.2d 21 (D.C. Cir. 1985) (Bork J. dissenting) he made clear his limited view of standing. He advocates blind deference by the judiciary to legislative and administrative bodies, regardless of the impact on individual rights:

> Every time a court expands the definition of standing, the definition of interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts. 759 F.2d at 58.

6. Executive Power

The Iran-contragate scandal exposed a president and staff that has a completely exaggerated view of executive powers, particularly in the realm of foreign affairs. It is an administration that asserts it was not bound by the Boland Amendment and that the President has exclusive power over foreign affairs--including the power to support a war against Nicaragua--contrary to the express intent of Congress. It is also an administration that believes any means can be used to carry out executive policy, including lying to the Congress. It is an administration which asserts, moreover, that the special prosecutor law--possibly the only means of checking presidential and administration abuse of authority--is unconstitutional.

The Supreme Court will be faced with resolving the issue, which goes to the heart of our constitutional system of separation of powers, of whether a president's actions are limited by law and subject to the will of the American people.

Faced with this crisis and the important role courts will play in its resolution, this country cannot afford to have a new Supreme Court justice who believes the president should have expansive and unlimited powers over foreign affairs and the war powers. There should not be confirmation of a justice who believes the courts should have no role in keeping the president within his constitutional limits. Robert Bork would be such a justice. He supports a Presidency with almost tyrannical powers. He believes the courts have no role to play in limiting this power even when such power entrenches upon congressional prerogatives.

Bork has clearly set forth his views of the plenary power of the executive to conduct foreign affairs unfettered by legislative or judicial constraint. In his view, this power encompasses much of the war power which the framers specifically granted to Congress. In his dissent in Abourezk v. Reagan, 785 F.2d 1043, 1062 (D.C. Cir. 1986), he wrote of the special defence that applies to the president's authority to make and implement decisions relating to the conduct of foreign affairs.

Some of Judge Bork's most telling congressional testimony about his view of the scope of the president's power over foreign affairs concerns his position on congressional efforts to impose a warrant requirement upon warrantless wiretapping. In 1978, a few years after the Church Committee revelations detailing the serious abuses engaged in by the intelligence agencies, Judge Bork testified that such a warrant requirement would be unconstitutional because it would interfere with the President's power over foreign affairs:

> The conduct of intelligence activities is basically a function of the Executive branch and comes within the constitutional powers of the President.
>
> This is not to say that the Congress has no role to play with respect to the war power or the power over foreign affairs, including foreign intelligence. It is to say that, as in the exercise of the war power, Congress' constitutional role is largely confined to the major issues, such as whether or not to declare war and how large the armed forces shall be. Congress makes the large decisions; it may not dictate the President's tactics in an area where he legitimately leads.

[Confirmation of Federal Judges, Hearings Before the Committee

on the Judiciary, U.S. Senate, 97th Cong. 2nd Sess. (March 11, 24, 31, 1982) at 134, 138].

In the face of the abuses of the Watergate period this testimony is extraordinary. It provides a carte blanche to the president to use the intelligence agencies as he chooses and with no controls. This is the precise position the president has taken with regard to his claim that the Boland Amendment unconstitutionally limits his inherent authority to control the intelligence agencies and employ them in covert operations in Nicaragua, Angola and elsewhere.

Judge Bork's views on the scope of judicial review are also quite remarkable. He does not believe it is the function of our courts to decide controversies concerning the allocation of power between the Congress and the president. Even if there should come a time when the president is invading congressional powers or violating a statute, and Congress brings such a case to the courts, Bork believes the courts should refuse to hear the case. See, Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985).

Thus, Judge Bork believes the courts should do nothing in foreign policy disputes between the Congress and the President. If the president is in violation of the Boland Amendment or the War Powers Resolution, he would not hear the cases. Had Congress gone to the courts to enforce the Boland Amendment, Bork would have refused to hear it, just as he will refuse to hear the present challenge to the reflagging of the Kuwaitii vessels.

This limited view of the judiciary functions operates to increase presidential powers. Congress can pass a law, the president can refuse to comply with it and Judge Bork would refuse to entertain any case challenging the president's non-compliance.

Judge Bork's views are contrary to almost 200 years of American jurisprudence. In the bedrock case establishing judicial review, Marbury v. Madison, 5 U.S. (1 Cranch), 137 (1803), Justice Marshall stated that "It is emphatically the province and duty of the judicial department to say what the law is." Without such a role for the courts we would not have a

government controlled by the Constitution, but one that could easily degenerate into tyranny. It is clearly the obligation of the courts to decide what the law is, and this is the case whether a suit is brought to the court by a private citizen or a public official.

Judge Bork does not disguise his position that foreign policy considerations permit the president to engage in intelligence activities against U.S. persons even if they are only engaged in exercising rights protected by the First Amendment. He testified in opposition to provisions of the Foreign Intelligence Surveillance Act which would limit spying upon persons solely engaged in First Amendment activities, calling such limitations "misguided." (Confirmation of Federal Judges, Hearing, supra at 458.) At that same hearing he made the extraordinary assertion which appears to deny the history of government intelligence activities and their ill effects on the First Amendment rights of Americans:

> I don't know that due to activities by our intelligence community that anybody's freedom of speech has be inhibited or that the freedom of the press has been inhibited, or that the integrity of our free institutions has been impaired.

Confirmation of Federal Judges, supra 464.

Further evidence of Judge Bork's unlimited deference to presidential power--even when it is exercised improperly--is his participation in the infamous "Saturday Night Massacre," and firing Watergate special prosecutor Archibald Cox. Attorney General Elliott Richardson resigned rather than fire Cox Deputy Attorney General William Ruckleshaus was discharged for failing to fire Cox. Bork's action violated the Department of Justice charter establishing the special prosecutor, under which Mr. Cox could be removed only for "extraordinary impropriety." It was later found to have been illegal by a federal district court. Judge Gesell wrote:

> In the instant case, the defendant abolished the Office of Watergate Special Prosecutor on October 20, and reinstated it less than three weeks later under a virtually identical regulation. It is clear that this turnabout was simply a ruse to permit the discharge of Mr. Cox without otherwise affecting the Office of the Special Prosecutor--a result which could not legally have been accomplished while the regulation was in effect under the circumstances

> presented in this case. Defendant's Order revoking the original regulation was therefore arbitrary and unreasonable, and must be held to have been without force or effect.

In his 1982 confirmation hearing, Judge Bork justified his action by saying, "I had a moral choice to make, not encumbered by the charter." Judge Bork chose to follow a President who sought to obstruct justice rather than follow the rule of law, and he rationalized his actions on the basis of a technicality. Particularly in these times of turmoil created by the actions of this Administration in the Iran Contra scandal, Mr. Bork's actions raise serious questions about the extent to which he, as a justice on the nation's highest court, would require the federal government to adhere to constitutional and other legal limitations.

* * *

The basic issue before this Congress is whether, in this year of the Constitution's Bicentennial, we are willing to allow a delicate constitutional balance that has been painstakingly established over these many years be destroyed by the ideological rigidity of a man who would subvert every important principle of modern constitutional adjudication. The threat to independent judicial review--the irreplaceable and treasured value in a democratic society that protects the rights and liberties of all citizens--is clear and present. In these circumstances the Senate, as it has done numerous times in the past, must vote to protect the Constitution by rejecting a Supreme Court nominee whose views are antithetical to the words and spirit of the Constitution. The Reagan Administration has made right wing ideological purity as the litmus test for appointment of federal judge. The Bork nomination has the potential of enshrining this ideology. If we allow this to happen to the Constitution we will surely return to the discredited era of discrimination, denial of individual rights, and unchecked governmental power.

WHY REAGAN SHOULD NOT APPPOINT ROBERT BORK OR ANYONE ELSE AS JUSTICE OF THE SUPREME COURT

President Reagan, his Administration discredited and compromised by lies and indictments, wants to put Robert Bork on the Supreme Court. Bork's confirmation would be a serious blow to all freedom-loving Americans and must be prevented. Furthermore, no appointments by this Administration should be confirmed by the Congress unless and until all outstanding investigations are completed and all charges of law-breaking are resolved.

Here's a sample of Bork's views and actions:

-- Bork opposed civil rights legislation in public accommodations in 1963, seeing this as an infringement of majority rights;

-- Bork opposes the right to abortion, calling the Supreme Court decision in Roe v. Wade "unconstitutional";

-- Bork upholds discrimination against homosexuals on the ground that the Constitution protects only heterosexual practices;

-- Bork opposes busing to remedy racial segregation in the schools;

-- Bork refuses to recognize sexual harassment as a form of sex discrimination;

-- Bork urges that most anti-trust laws should be abolished;

-- Bork argues that First Amendment protections should be limited to "political" speech, leaving all other types of speech uprotected;

-- Bork fired Archibald Cox, the Watergate Special Prosecutor, at President Nixon's order, despite the fact that two of his predecessors resigned rather than carry it out.

Bork's supporters say that he has changed his mind on some of these issues. But there is no reason to think that his future judicial record will depart significantly from his reactionary past.

Rather, as Senator Edward M. Kennedy has said: "Robert Bork's America is a land in which women would be forced into back-alley abortions, Blacks would sit at segregated lunch counters, and rogue police would break down citizens' doors in midnight raids."

Before the

Senate Judiciary Committee

Hearings on the Confirmation of Robert Bork

Written Testimony of Joel D. Joseph,

Attorney and Publisher of National Press, Inc.

October 3, 1987

Judge Bork's application of the original intent doctrine is a formula for disaster. After four years of research I have just completed writing my sixth book, Black Mondays: Worst Decisions of the Supreme Court. This book documents twenty-four of the court's most outrageous decisions, and many of those were based on interpretations of "original intent."

I am submitting this testimony on my own behalf. I am the publisher and general counsel of National Press, a Washington, D.C.-based book publisher. As an attorney I represented more than sixty Members of Congress and candidates for Congress, before the federal courts. I was counsel for Congressmen from both parties who challenged the Panama Canal Treaty. During the past fourteen years I have appeared before the United States Supreme Court in about ten cases, and before the United States Court of Appeals for the District of Columbia Circuit in about fifty cases. The major issues in most of those cases concerned interpretation of the Constitution and standing.

Original Intent as Applied by the Supreme Court

Two of the very worst Supreme Court cases were based on the doctrine of original intent. One was the Dred Scott case in 1857, which has been discussed extensively in these hearings. The court ruled in that case that slaves could not file suit in court to gain their freedom because the intent of the Founding Fathers was that slaves would have no rights. The court went well beyond the issues in the case and decided that Congress could not regulate slavery in the territories. The Supreme Court, by using the doctrine of original intent, has unbounded discretion to determine what it believes the Founding Fathers meant. Its construction of that intent in the Dred Scott case led to the Civil War.

Another disastrous decision by the Supreme Court denied women the right to vote in 1875. That case, Minor v. Happersett, decided that since women did not have the right to vote in 1787 that the intent of the Founding Fathers must have been that women did not have a constitutional right to vote. Further, the court ruled that the recently enacted Fourteenth Amendment intended to give blacks the right to vote, and not to give women the right to vote. Judge Bork, before these hearings, had a similar view of the Fourteenth Amendment.

When a constitutional provision is clear on its face there is no reason to explore the intent of those who wrote the provision. In my opinion the Fourteenth Amendment's "equal protection of the laws" is perfectly clear. The Amendment does not mention race and it should not be interjected by judges or justices. Original intent is a mechanism for judges to write laws and to rewrite the Constitution.

Judge Bork previously has stated that believes that the original intent of the Fourteenth Amendment was only to protect blacks--not women, aliens, Hispanics, homosexuals or other citizens. His views have now, apparently, been modified. I don't know how he can reconcile this change with his committed belief in the original intent doctrine.

Some Senators and witnesses have blurred the differences between Justices who apply the original intent doctrine and strict constructionists. "Original intent" and "strict construction" are not the same thing. "Strict construction" of the Fourteenth Amendment leads the reader to the conclusion that "equal protection of the laws" applies to all races, sexes and other classifications of citizens. On the other hand the "original intent" of the amendment was that it would apply only to blacks.

The Special Prosector Law

The Founding Fathers feared a strong executive and would have supported the constitutionality of a law which allowed the appointment of special prosecutors. Judge Bork chooses to ignor the intent of the Founding Fathers in this area and supports the

executive in his battles with the other "co-equal" branches of government. Bork testified that he believes that the special prosecutor law is unconstitutional.

In 1973 I participated in a lawsuit which requested that Judge Sirica appoint a special prosecutor in the Watergate case. At the time there was no special prosecutor law. However, there were many precedents for judges to appoint special prosecutors where a conflict of interest existed. As a participant in the Special Prosecutor Project, which led to the current law, I am particularly concerned that Judge Bork would find the special prosecutor law unconstitutional, and turn back the clock fifteen years in the effort to prevent conflicts of interest in the executive branch.

Congressional Standing

Judge Bork has also favored the executive branch in its disputes with the legislative branch. He contends that our elected legislative representatives have no standing to challenge actions of the executive branch. That leaves us with provisions of the Constitution which no one can enforce.

I represented Congressmen from both sides of the aisle in their challenge to the constitutionality of the Panama Canal Treaty. The United States Court of Appeals for the District of Columbia Circuit (in a two-to-one decision) ruled that the Congressmen had no standing to challenge the treaty. Article IV, Section 3, clause 2 of the Constitution provides that Congress has the power to dispose of property belonging to the United States. The Panama Canal was property of the United States. President Carter chose to bypass the House of Representatives by submitting the disposition of property to the Senate. The Supreme Court denied review and therefore no decision on the merits was ever issued.

Whether or not you believe that the President, by treaty, had the right to give the Canal to Panama you should agree that there is a conflict between the treaty power and the power to dispose of property of Constitutional magnitude. And you should

also agree that Members of Congress, those elected officials who Judge Bork claims are the keystone of democracy, should have the right to go to court to enforce their constitutional powers. But Judge Bork finds that legislators have no standing. It is not clear who he believes has the right to enforce the constitutional rights of our elected legislators.

Judges, Scholars and the Mainstream

I am not quite sure where all the talk of the "mainstream" of justice comes from. There is no one "mainstream" in the law. For almost any legal proposition there are usually two main currents of law, and just as often one of the currents is outdated, or plain wrong. Opponents of Judge Bork should not have to show that he is outside the mainstream, only that he is in the wrong stream.

The hearings have brought forth an abundance of law professors. Law professors do not have a monopoly on justice. In fact many law professors make lousy judges. Justice Frankfurter is a case in point. Many have praised Frankfurter during the hearings: he seems to have grown in stature since his death more than twenty years ago. During his lifetime Justice Frankfurter participated in more horrendous decisions than nearly any other justice. President Franklin Roosevelt said that his appointment of Frankfurter to the court was one of the worst decisions that he made during his tenure in the White House.

During Felix Frankfurter's term on the nation's highest tribunal seven of the courts twenty-four worst decisions were

made. He voted with the majority in all seven of the cases. These cases include the Korematsu case (which upheld the internment of Americans of Japanese ancestry), the Gobitis decision (which upheld compulsory flag salute laws), the Breard case (which upheld the constitutionality of laws prohibiting door-to-door salesmen), the Chaplinky and Feiner cases which limited free speech, In Re Summers (which allowed Illinois to deprive an attorney of bar membership because of religious beliefs) and the Crown Kosher Supermarket decision (which forced a Kosher food store to close on Sunday).

President Reagan announced that if given the chance he would appoint nine Frankfurters to the Supreme Court. Nine justices of the same philosophy would be a disaster; nine with views like Justice Frankfurter would destroy the judicial system of the United States.

President Reagan has already been given too much leeway in the appointment of federal judges and Supreme Court Justices. Unfortunately, the committee does not have time to examine every judicial appointment like this one.

Confirmation of Judge Bork will deprive many citizens, and Congressmen, of justice and access to justice, and will increase executive power at the expense of the legislative branch. Many of Judge Bork's views are antithetical to individual liberty and to other constitutional values. The committee should vote to deny Judge Bork a seat on the Supreme Court.

I thank the committee for the opportunity to present my views.

STATEMENT FOR THE RECORD

of

DOUGLAS G. GLASGOW
VICE PRESIDENT FOR WASHINGTON OPERATIONS
NATIONAL URBAN LEAGUE, INC.

BEFORE THE

SENATE JUDICIARY COMMITTEE

on

THE CONFIRMATION OF JUDGE ROBERT H. BORK
TO THE U.S. SUPREME COURT

The National Urban League (NUL) was founded in 1910 as a non-profit community service organization committee to securing full and equal opportunities for minority groups and the poor. There are currently 112 Urban League affiliates (including the District of Columbia) located in 34 states. Over one million persons are served every year by the Urban League Movement through its comprehensive array of services, programs and projects that address such needs as education, adolescent pregnancy, health, housing, employment training and crime prevention.

As Black Americans, we feel that the Constitution throughout its history has served as a most important document to govern a free people. Initially, the document did not seek to provide rights to Black people, however, the framers did allow for the inclusion of amendments. Because the Constitution stands high in its importance to this nation, we shall continue to strive for a Constitution that will always remain a viable source for ensuring the rights of all Americans.

After careful review and examination of his published writings and speeches, the League believes that Judge Robert Bork should not be confirmed to the U.S. Supreme Court. His judicial inter-

pretations of the 14th Amendment is not within the mainstream of American thinking. For example, Judge Bork:

- o Opposed decisions banning literacy tests;
- o Does not believe that the 14th Amendment bars judicial enforcement of racially restrictive covenants;
- o Opposed the decision outlawing poll taxes;
- o Opposed the decision advancing open housing;
- o Rejected the one-man one-vote principle;
- o Rejected the decision which allowed busing to desegregate a de jure segregated school system;
- o Does not believe that the 14th Amendment entitles Congress to remedy de facto discrimination against racial minorities; and
- o As Solicitor General, Judge Bork was a non-aggressive defender of civil rights.

Each of these actions have a significant bearing on the 14th Amendment.

Mr. Chairman, I do not have to tell you and the members of this Committee of your constitutional responsibility to advise and consent on the nominee that is before you. At stake for the League constituency is the issue of civil rights which are protected by the 14th Amendment. This Amendment was specifically targeted at states which imposed restraints that only burdened Black Americans. It sought to reverse actions that:

- o subjected Blacks to stricter penalties than whites;
- o Blacks were considered incompetent to testify in court, even when their own interests were at stake;
- o Blacks could not make a contact;
- o Blacks could not sue in court; and
- o Blacks could not travel freely from state to state.

In essence, Blacks were denied all of the fundamental rights that the Constitution afforded others. Without a doubt, the enactment of the 14th Amendment was a landmark occurrence in the field of civil rights. While it is important to note the significance of the 13th Amendment, which abolished slavery, and the 15th Amendment, which gave Blacks the right to vote, the 14th Amendment reigns supreme as the vehicle that has cleared the way to rights for Blacks. Black America believes that the

enactment of the 14th Amendment laid the groundwork for citizenship and equal protection under the law.

The enactment of Section 1 to the 14th Amendment established that all persons born or naturalized in this country inherit the right to become citizens. Section 1 of the 14th Amendment was clearly enacted to deal with the civil rights of all people. "In addition to providing citizenship, the intent behind Section 1 was to make it illegal for the states to deny equal civil rights to those thus made citizens by the provision that no state was to 'deprive any person of life, liberty, or property without due process of law'; or deny to any person within its jurisdiction the equal protection of the laws."[1] Ratification of the 14th Amendment on July 9, 1968 paved the way for the safeguarding of civil rights. However, in 1987, the effects of the 14th Amendment for Black rights have not become a full reality.

The reason for creating the 14th Amendment was to eliminate the decision in Dred Scott v. Sandford, 19 How. 393 (1857). From its inception, the 14th Amendment had limitations for effective ways to ensure equal rights to protect Blacks against discrimination. The first test of the 14th Amendment came in Plessy v. Ferguson, 163 U.S. 537 (1896), when the Supreme Court, in its support of the "separate but equal" doctrine, in fact condoned discrimination by law. It took some 58 years before the 14th Amendment fulfilled its intended purpose. In the landmark 1954 case of Brown v Board of Education, 347 U.S. 483 (1954), the Supreme Court overruled the "separate but equal" doctrine of Plessy and at last the intent of the 14th Amendment became a reality.

We cannot fail to acknowledge the insight of Justice Thurgood Marshall, who delivered a key speech at the annual seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii, on May 6, 1987. Justice Marshall made the following statements which clearly defines our attitude and position towards the Constitution and the 14th Amendment.

"While the Union survived the Civil War, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws. And yet almost another century would pass before any significant recognition was obtained of the rights of Black Americans to share equally even its basic opportunities as education, housing, and employment, and to have their votes counted, and counted equally. In the meantime, Blacks joined America's military to fight its wars and invested untold hours working in its factories and on its farms, contributing to the development of this country's magnificent wealth and waiting to share in its prosperity."

Justice Marshall stated further:

"What is striking is the role legal principles have played throughout America's history in determining the condition of Blacks. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law."

We find Justice Marshall's statement to be profound. The 14th Amendment has been the vehicle in which we as Blacks have attained equality under the law.

In 1987, can we afford to have a Justice sit on the U.S. Supreme Court, who in his 1972 explaination of his views regarding the constitutional restrictions on federal civil rights legislation, urged that Congress could not, under the 14th Amendment, accept remedies for a discriminatory purpose? Judge Bork stated:

"The power to 'enforce' the 14th Amendment is the power to provide and regulate remedies, not the power to define the scope of the amendment's command or to expand its research indefinitely.[2]

If the Supreme Court were to accept Judge Bork's position regard-

ing the limited nature of congressional authority under the 14th Amendment, the validity of many federal statutes establishing a discriminatory effect standard would indeed be in doubt.

Further, we do not need a sitting Justice on the U.S. Supreme Court who in 1963, wrote an article opposing adoption of Title II of the 1964 Civil Rights Act, which prohibits racial discrimination in public accomodations.[3] Judge Bork offered three distinct reasons as to why this legislation should be rejected. First, he argued that Title II would be difficult or impossible to enforce; Second, he contended that Title II was objectionable because the bill would lead to other anti-discrimination measures. And finally, Judge Bork opposed Title II because he believed that it infringed on the freedom of whites to discriminate.

However, during the confirmation hearing, Judge Bork repudiated many of his civil rights positions of the past. I strongly question his ability to adopt new attitudes and positions on Civil Rights issues which he has firmly opposed for so many years.

In conclusion, the National Urban League Movement vigorously opposes the confirmation of Judge Robert Bork as an Associate Justice to the United States Supreme Court. He has displayed extreme hostility to the judicial decisions and legislative actions which form the foundation of the civil rights movement. In addition, he espouses a judicial philosophy directly at odds with the civil rights-civil liberties principles and axioms embraced by the National Urban League Movement.

FOOTNOTES

1. Statutory History of the United States: Civil Rights Part I; by Bernard Schwartz: Chelsea House Publishers 1970

2. Hearings on the Human Life Bill Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Congress, 1st Session (1982).

3. "Neutral Principles and Some First Amendment Problems," 47, Indiana Law Journal 1, (1971), at 15-16.

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Statement

of

Marcia D. Greenberger
Suzanne E. Meeker
Ellen J. Vargyas

National Women's Law Center

in opposition to

the Nomination of

Judge Robert H. Bork

to the

United States Supreme Court

Submitted to the

Comittee on the Judiciary

of the

United States Senate

October 5, 1987

The National Women's Law Center appreciates the opportunity to submit this statement on the nomination of Judge Robert H. Bork to the United States Supreme Court. Since 1972, the Center has advocated equality before the law for women and girls and worked to achieve that end, in part, through litigation to establish women's statutory and constitutional rights and to ensure full and effective enforcement of those rights.

Following the announcement of Judge Bork's nomination, the Center reviewed Judge Bork's legal opinions, writings, and statements bearing on issues affecting women's legal rights. Although many aspects of Judge Bork's record caused us concern, because of our particular background and expertise we focused our attention on the specific issues affecting women. Our analysis of his extensive legal record in this regard has compelled us to oppose his elevation to the Supreme Court, although the Center has never before taken a position on a judicial nomination. The basis for this position is detailed in our written report, Setting the Record Straight: Judge Bork and the Future of Women's Rights, attached as the appendix to this statement. We ask that this report be included as part of the record.

Based on Judge Bork's record, as set out in our report, our principal reasons for opposing Judge Bork's confirmation are as follows: His extreme legal views, including his views on the constitutional rights to equal protection of the laws and of privacy, place him well outside the mainstream of American

jurisprudence. Further, on statutory issues of women's rights, although Judge Bork has advocated judicial restraint widely, he has not always practiced it, to the detriment of women's interests. Finally, Judge Bork's record strongly suggests that he would be even more active as a Supreme Court justice, seeking out every opportunity to implement his extreme views.

The record developed during the confirmation hearings supports our position that the Senate should withhold its consent to Judge Bork's nomination to the Supreme Court. Our statement will address the claims made by Judge Bork and his supporters in these confirmation hearings that he is a friend of women's legal rights. This assertion is based on a highly selective description of his record as Solicitor General and Court of Appeals judge and on a theory he espoused for the first time before this Committee regarding equal protection analysis for sex discrimination cases. Moreover, it is argued, Judge Bork's voluminous academic writings and non-judicial statements -- many of which are overtly hostile to women's legal rights -- are irrelevant to the inquiry.

A fair review of Judge Bork's whole record, including the record amassed at the hearings, proves these claims to be wrong. Moreover, the assertion takes no notice whatever of Judge Bork's view, which he affirmed once more at the hearings, that he has found no constitutional basis for the right to privacy. Together with the 14th Amendment, the right to privacy has formed the cornerstone for the constitutional rights women have depended

upon for protection for themselves and their families.

JUDGE BORK'S NON-JUDICIAL RECORD

It is obvious why Judge Bork sought in these hearings to distance himself from his speeches and writings on women's rights under the 14th Amendment. In his statements from 1971 right up until the summer of 1987, Judge Bork has consistently made it exceedingly clear that, in his view, the equal protection clause of the 14th Amendment provides no special protection for women and, moreover, as a matter of policy, it should not. The following statements, presented in chronological order, leave no question as to what his views have been:

- "The equal protection clause has two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause * * *. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible." Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 11 (1971).[1]

- "When [judges] begin to protect groups that were historically not intended to be protected by that clause [equal protection], what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them.* * * All of these are nationalizations of morality, not justified by anything in the Constitution, justified only by the sentimentalities or the morals of the class to which these judges and their defenders belong." Federalism and Gentrification, Address by Judge Bork to The Federalist Society (Apr. 24, 1982).

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[1] Although Judge Bork wrote this article in 1971, as recently as 1985 he described it as representing his philosophy. See McGuigan, An Interview with Judge Robert Bork, Judicial Notice, June 1986, at 1, 15.

- "In the Fourteenth Amendment case, the history of that is somewhat confusing. We know race was at the core of it. I would think pretty much race, ethnicity (pause) is pretty much what the 14th Amendment is about; because if it's about more than that, it's about a judge making up what more it's about. And I don't think he should." Additional Comment, Address by Judge Bork to the Justice and Society Seminar, Aspen Institute for Humanistic Studies (Aug. 11-24, 1985) (transcribed from tape).

- "I no longer feel free to comment about ERA since I'm now a judge. But I do feel free to explain what I meant ten years ago [in opposing the Amendment], which was that the Amendment didn't say that Congress shall have power to provide for sexual equality in all cases, or something of that sort. What it said was, 'Judges shall have power to decide what sexual equality is in all cases.' Now the role that men and women should play in society is a highly complex business, and it changes as our culture changes. What I was saying then was that it was a shift in constitutional methods of government to have judges deciding all of those enormously sensitive, highly political, highly cultural issues. If they are to be decided by government, the usual course would be to have them decided by a democratic process in which those questions are argued out." McGuigan, An Interview with Judge Robert H. Bork, Judicial Notice, June 1986, at 1, 7-8 (emphasis added).

- "MR. BORK: Well, at this point, I suffer from a certain handicap. That is as a judge, I cannot speak freely about matters that are matters of current controversy. I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity. When the Supreme Court decided [in Craig v. Boren] that having different drinking ages for young men and young women violated the Equal Protection Clause, I thought that was a very -- that was to trivialize the Constitution and to spread it to areas it did not address." Dialogue: Bicentennial of the U.S. Constitution (Worldnet television broadcast, June 10, 1987).

JUDGE BORK AS SOLICITOR GENERAL

Judge Bork testified at the Senate hearing on his nomination to be Solicitor General that the Solicitor General is not a policy maker but the government's lawyer. In response to a question directly on this subject, he stated that as Solicitor General "I will enforce the policy of the government * * * as the government defines it. I do not define it, Senator."

In fact, while Solicitor General, that is exactly what Bork did. He presented government positions which favored women, including the position urged by the Equal Employment Opportunity Commission and the Civil Rights Division of the Justice Department in General Electric v. Gilbert that pregnancy discrimination on the job may be prohibited sex discrimination. He also presented governmental positions as Solicitor General which were deeply inimical to women's legal rights in cases such as Weinberger v. Weisenfeld and Califano v. Goldfarb, where he argued in support of broad-based discrimination in the Social Security Act. These statutory classifications were subsequently declared unconstitutional by the Supreme Court. Judge Bork's record as Solicitor General is one of an attorney representing his client -- nothing more and nothing less. It is not a record of support for women's rights.

JUDGE BORK AS APPELLATE COURT JUDGE

Judge Bork has argued that his work as a judge on the D.C. Circuit is of particular relevance to the confirmation inquiry

and has testified that seven out of eight times he voted in support of women's or minority rights when considering such cases as a judge. To begin with, this list fails to include at least eighteen additional cases Judge Bork ruled on which dealt expressly with the efforts of women and minorities to enforce their constitutional and/or statutory civil rights. One analysis shows that he fully supported the defendants in 15 of the 26 cases and ruled partially for the defendants in still more cases. Further, totally absent from his list are three cases in which he authored opinions overtly hostile to women's rights. Indeed, his list demonstrates his narrow view of the substance of women's rights and the breadth of areas that affect women.

The missing cases include Vinson v. Taylor, where he filed a dissent that questioned whether sexual harassment should be prohibited sex discrimination under Title VII, and argued for standards that would have made it virtually impossible to prove such harassment. He was subsequently repudiated in a unanimous decision by the Supreme Court, written by Chief Justice Rehnquist. Judge Bork's list also fails to acknowledge King v. Palmer, where he reached out yet again to advance his extreme views regarding sexual harassment.

And Judge Bork also chose to ignore Oil, Chemical, and Atomic Workers Int'l Union v. American Cyanamid Co., where he ruled that the Occupational Safety and Health Act did not ban an employer's "fetus protection" policy that permitted women of childbearing age to work in a certain plant department only if

they were surgically sterilized. He did not require the company to clean up its extremely hazardous work place -- which endangered, in addition to fetuses, both women's and men's ability to bear children. In reaching this decision, he did not even question an administrative determination that it would have cost too much to make the workplace safer. Nor did he acknowledge the availability of far less drastic alternatives such as providing the women other jobs at the same pay.

JUDGE BORK AS A WITNESS

Judge Bork's testimony at this Committee's hearings does nothing to alter his record of hostility to women's legal rights. His principal strategy to rehabilitate himself -- in addition to his selective recounting of his record -- is based on his assertion that he adheres to a theory of equal protection called the "reasonable basis" test, a theory which Justice Stevens has advocated for a number of years. This test has never been adopted by the Court. Nor, prior to these hearings, has it ever been publicly acknowledged by Judge Bork.

According to Judge Bork, the "reasonable basis" test would lead to the same results as those reached in recent years by the Supreme Court in sex discrimination cases. While this has generally been the result in Justice Stevens' analysis, the few explanatory statements offered by Judge Bork in his testimony strongly suggest that his application of the inherently highly subjective "reasonableness" standard would be quite different.

Most telling is Judge Bork's discussion of Craig v. Boren, the leading sex discrimination case that he has said "trivializes" the Constitution. While Justice Stevens found that the sex-based discrimination at issue -- differential drinking ages based on sex -- violated equal protection, Judge Bork expressed in his testimony a willingness to be persuaded that the classification was reasonable based on statistics showing a small differential in highway safety records of young men and women. Similarly, Judge Bork stated that generalizations about physical differences and economic relationships between the sexes could support a finding of reasonableness. This approach most emphatically reflects neither that of Justice Stevens nor the Court. Both have consistently rejected the use of precisely these sorts of generalizations in evaluating the constitutionality of gender-based distinctions.

The clear import of the totality Judge Bork's record is that he would apply, in substance, what is commonly called the rational basis test to claims that sex discrimination violates the 14th Amendment. This test gives enormous deference to sex-based classifications drawn by local, state, and federal governmental bodies. It was the governing standard applied to sex discrimination cases before 1971 and has never been used to strike down a gender-based discrimination.

It should be noted that Judge Bork's supporters agree with this analysis of his position. For example, the materials submitted to this Committee by Carla Hills argue that Judge Bork

should be supported precisely because he would defer to legislative bodies in matters of sex-based classifications.

Finally, it should be noted that during the hearings, Judge Bork did not move significantly away from his past-stated views on the right to privacy. He did try in his testimony to soften his oft-expressed, harsh view that decisions finding such a right are "unprincipled" and based on no "supportable method of constitutional reasoning" by suggesting that he would be open to new arguments regarding the basis of such a right. However, it is quite clear that the likelihood of Judge Bork's finding a brand new constitutional theory to support a right to privacy is virtually nil. As a result, it is quite clear that Judge Bork finds no support for the critically important reproductive and familial rights which have been based in the constitutional right to privacy.

CONCLUSION

In sum, no amount of selective citation and interpretation can change Judge Bork's record on women's legal rights from what it demonstrably is -- one of deep hostility. Judge Bork's nomination to the Supreme Court should be rejected.

Marcia D. Greenberger
Suzanne E. Meeker
Ellen J. Vargyas

APPENDIX

Setting The Record Straight:

Judge Bork

And The Future Of Women's Rights

A Report By The

NATIONAL WOMEN'S LAW CENTER

August, 1987

SETTING THE RECORD STRAIGHT:

JUDGE BORK AND THE FUTURE OF WOMEN'S RIGHTS

Ellen J. Vargyas
Suzanne E. Meeker
Marcia D. Greenberger
Nancy Duff Campbell

August, 1987

The authors of this report are attorneys at the National Women's Law Center. They wish to thank Gretchen Lucken, a third-year law student at Catholic University, and Monica Barrett, a third-year law student at the University of Michigan, for their assistance in its preparation.

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EXECUTIVE SUMMARY

Following the nomination of Judge Bork to the Supreme Court, the National Women's Law Center undertook a review of his court decisions, writings and statements that bear on the legal rights of women. Judge Bork has stated that the courts are ill-suited to address problems of sex discrimination. His record reflects that view, both in the approach he has articulated for interpreting the law, and his actual court decisions.

Judge Bork strongly disagrees with Supreme Court cases interpreting the constitutional rights to equal protection and privacy that form the cornerstone legal protections for women. Judge Bork also has interpreted statutes narrowly that afford women critical protections in the areas of employment and health. Finally, Judge Bork is a judicial activist who supports overturning the Supreme Court precedents affecting women's rights, which he believes are wrongly decided, and who as a judge has seized unusual opportunities to advance his positions.

In Judge Bork's view, the Constitution provides no specific protections for women except for suffrage. Women would be left defenseless against government discrimination under his interpretation of the Constitution.

1. Judge Bork believes that the fourteenth amendment equal protection clause is designed to eliminate only discrimination on the basis of race. His theory that the Constitution and its amendments must be interpreted according to their historical

context precludes any specific fourteenth amendment protection against sex discrimination.

- Instead of the courts giving careful, or "heightened," scrutiny to governmental policies that treat men and women differently, as the Supreme Court has required since 1971, Judge Bork would return to the old standard that any "rational" basis is reason enough to justify discrimination. All claims of illegal sex discrimination considered under the rational basis standard have been rejected by the Supreme Court.
- A long line of Supreme Court cases beginning in 1971 used a new "heightened scrutiny" test to invalidate government-sponsored sex discrimination. Cases that would be overturned by Judge Bork's reasoning include
  - State's automatic preference for males over females to serve as executor of estates held invalid [Reed v. Reed (1971)]
  - Stricter requirements for servicewomen than servicemen to claim dependents held invalid [Frontiero v. Richardson (1973)]
  - Different Social Security benefits for women and men held invalid [Weinberger v. Wiesenfeld (1975); Califano v. Goldfarb (1977)]
  - State statute obligating parent to support sons to an older age than daughters held invalid [Stanton v. Stanton (1975)]

- State statute giving husbands exclusive authority to manage community property jointly owned by the husband and wife held invalid [Kirchberg v. Feenstra (1981)]

2. Judge Bork believes that there is no constitutionally-protected right to privacy. In his view, the framers of the Constitution did not envision such a right, and therefore landmark Supreme Court cases based on the right to privacy over the last fifty years were wrongly decided.

o Judge Bork disagrees with Supreme Court cases that have carved out a sphere of familial privacy and integrity with which the government cannot constitutionally interfere, and would decide them differently. Cases that would be overturned include

- State prohibition against teaching of modern foreign languages violates fundamental rights of parents to control their children's education [Meyer v. Nebraska (1923)]
- State law requiring children to attend public schools irreasonably interferes with parents' right to direct the education of their children [Pierce v. Society of Sisters (1925)]
- School board requirements that pregnant teachers resign at a fixed time early in pregnancy held invalid [Cleveland Bd. of Educ. v. LaFleur (1974)]

- In a court of appeals case, Judge Bork wrote a separate statement that described the right asserted by a non-custodial father to discover the location of his children as "tenuous" and unworthy of constitutional protection [Franz v. United States (1983)].
- Judge Bork disagrees with Supreme Court cases that have protected access to contraception and abortion on the basis of a constitutional right to privacy, and would reverse cases that include
  - State law prohibiting the sale or use of contraceptives, even by married couples, held invalid [Griswold v. Connecticut (1965)]
  - State law prohibiting access to abortion held invalid [Roe v. Wade (1973)]

Judge Bork's narrow interpretation of the Constitution is mirrored by his narrow interpretation of statutes designed to protect women.

1. In the area of employment, Judge Bork has advocated legal positions that would seriously narrow women's statutory protections -- protections that have been confirmed by the Supreme Court.

- In Vinson v. Taylor (1985) (op. dissenting from denial of rehearing), Judge Bork questioned whether job-related sexual harassment should be sex discrimination prohibited at all by Title VII of the 1964 Civil Rights Act. In this case, Judge Bork also stated that sexual

harassment cases should be harder to prove and subject to different standards than other Title VII discrimination cases.

In a unanimous opinion, written by now Chief Judge Rehnquist, the Supreme Court rejected Judge Bork's reasoning, and held not only that sexual harassment was a violation of Title VII, but that the severe standards of proof Judge Bork would impose were not appropriate.

- Judge Bork has expressed the view that the legal theory underlying affirmative action remedies to overcome the effects of past governmental discrimination is wrong. In contrast to Judge Bork's view, last term in Johnson v. Department of Transportation, the Supreme Court affirmed the validity and importance of affirmative action to provide women access to highly paid jobs from which they had been excluded in the past.

2. In the area of health, Judge Bork has analyzed statutes inconsistently, finding no Congressional authority to protect women's health in one statute, while reaching to find Congressional authority to allow restrictions on access to contraceptives in another.

- In Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid Co. (1984), Judge Bork held that despite the language of the Occupational Safety and Health Act, which he conceded arguably applied, an employer would not violate the Act by having a policy

that required female employees to become surgically sterilized in order to keep their jobs.

- In Planned Parenthood v. Heckler (1983), Judge Bork adopted a very different approach. In a case holding that Congress did not authorize the Department of Health and Human Services (HHS) to require a parental notification rule covering family planning grantees, Judge Bork conceded that the rule was invalid. But he further stated that the case should be remanded to HHS, and developed a theory under which, in his view, HHS could lawfully reissue the rule.

Judge Bork has stated his belief that "mistaken" Supreme Court decisions should not be followed in future cases; has indicated a belief that the Supreme Court cases upon which fundamental rights of women are based are mistaken; and has a record demonstrating that he would actively seek to implement his views.

1. Judge Bork has stated that justices should freely correct prior Supreme Court decisions, unless precedents are so fixed, as under the Commerce Clause, that they should not be overruled.

- Judge Bork has given every indication that precedents based on the rights to privacy and heightened protection for women under the equal protection clause should be changed.

- Judge Bork has described as unconstitutional or unprincipled the application of the equal protection clause to "non-racial inequalities;" the Griswold decision allowing the sale and use of contraceptives; and the Roe v. Wade decision upholding a woman's right to abortion.

2. While on the Court of Appeals, Judge Bork has taken unusual steps to advance his views.

- Although bound by Supreme Court precedent finding a constitutional right to privacy, in an opinion addressing the employment rights of homosexuals in the Armed Forces, he included a review of his general position on the right to privacy and his opinion of the correctness of Supreme Court precedents [Dronenburg v. Zech (1984)].
- In a sexual harassment case, he filed a "separate statement" seeking to limit the reach of an opinion by a panel of which he was not a member, even though rehearing was denied [King v. Palmer (1985)].
- In a case involving privacy rights asserted by a father seeking access to his children, in which he was a member of the panel, Judge Bork filed a statement attacking the constitutional rights afforded the father by the majority, not when the opinion was issued but more than a month later [Franz v. United States (1983)].

In sum, Judge Bork's record is one of a judicial activist, whose views place him outside the mainstream of jurisprudential thought. These views, if implemented by the Supreme Court, would have profound consequences for the legal rights of women.

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SETTING THE RECORD STRAIGHT: JUDGE ROBERT BORK AND THE FUTURE OF WOMEN'S RIGHTS

The National Women's Law Center has undertaken a review of Judge Robert Bork's writings and statements, both judicial and academic, in light of their implications for women's legal rights. There are three major conclusions to be drawn from our review of Judge Bork's record over the past twenty-five years, including his judicial opinions issued since he became a member of the United States Court of Appeals for the District of Columbia Circuit in early 1982. First, Judge Bork has attacked the validity of key legal precedents upon which women's constitutional rights, including equal protection and privacy, are based. Second, Judge Bork has interpreted women's statutory rights in the critical areas of employment and health in a severely limited fashion. And third, Judge Bork is a judicial activist, who would seek to tailor the law to fit his views. These conclusions are based on a substantial body of material, for Judge Bork's views are well-established and widely documented.[1]

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[1] Our review does not include positions taken by Judge Bork in his capacity as Solicitor General of the United States from 1973 to 1977. As Judge Bork himself testified at the Senate hearing on his nomination to that post, the Solicitor General is not a policy maker but the government's lawyer:

> "Senator Hart. What if the Government takes a position in the field of antitrust or civil rights that you think is wrong, and have said in the past is wrong, what do you do?
>
> "Mr. Bork. What will I do? I will enforce the policy

I. JUDGE BORK'S THEORY OF CONSTITUTIONAL INTERPRETATION HAS NO PLACE FOR SPECIFIC WOMEN'S RIGHTS.

Judge Bork has articulated a theory of constitutional interpretation that, save for the explicit grant of suffrage, effectively leaves women without any constitutional protections based on their status as women. Alternatively called the doctrine of original intent or interpretavism, as formulated by Judge Bork this doctrine holds that the meaning of the Constitution and its amendments were frozen at the time of their creation. He has said that courts must interpret the Constitution only as the men "who drafted, proposed, and ratified its provisions and its various amendments" would have applied them in the historical context in which they were written and

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of the government in antitrust as the Government defines it. I do not define it, Senator."

Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 8 (1973).

In fact, the government's record on women's issues during Judge Bork's service as Solicitor General is mixed. In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), for example, the government defended a sex-discriminatory Social Security benefits provision, while in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), the government presented the position of the Equal Employment Opportunity Commission that pregnancy-based discrimination in employee benefits violated Title VII of the 1964 Civil Rights Act.

ratified.[2] Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823, 826 (1986).[3]

It is not the purpose of this analysis to offer a critique of Judge Bork's views of original intent. Others have shown that the philosophy of original intent as set forth by Judge Bork is,

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[2] Judge Bork would accommodate certain technological advances, i.e., he would apply the first amendment freedoms of press and speech to television and the fourth amendment protection from unreasonable searches and seizures to electronic surveillance, see Bork, Judicial Review and Democracy, Society, Nov.-Dec. 1986, at 5, 7. However, his philosophy does not acknowledge the social changes that have marked our nation's history. For, according to Judge Bork, "if [a judge] alters the basic value he is running his own values into the system, and I don't think he should do that." Deniston, Judge Robert H. Bork: judicial restraint personified, Cal. Law., May 1985, at 23, 26. Judge Bork nowhere explains why modern technology should be accorded a greater constitutional respect than far more profound -- and equally unforeseeable -- changes in our social fabric.

Judge Bork does read the fourteenth amendment broadly enough to encompass one critical social change, that reflected in the Supreme Court's landmark decision in Brown v. Board of Educ., 347 U.S. 483 (1954), which held that "separate but equal" schools are prohibited by the equal protection clause. His recognition of the validity of Brown is premised on his view that evolving ideas as to what is necessary to achieve the fourteenth amendment's "core idea of black equality against governmental discrimination" are judicially cognizable. See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 14-15 (1971). As we show below, however, Judge Bork's reasoning in this instance does not affect his view of sex discrimination under the fourteenth amendment since he does not see equality of women as a "core idea." See id. at 11.

[3] See also id. at 832; Bork, Styles in Constitutional Theory, 26 South Tex. L.J. 383 (1985). For clarity, after the first citation to each of Judge Bork's articles, this report cites them by periodical name.

itself, based on neither the intent of the framers nor widely-held historical views.[4]

Rather, our emphasis here is on the broad-ranging and, in fact, dramatic consequences of Judge Bork's theory of original intent for women's constitutional rights. For by explicitly limiting constitutional interpretation to reflect the values of the eighteenth and nineteenth centuries when the Constitution and the civil war amendments were drafted -- values that clearly did

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[4] In the words of Chief Justice Hughes, written over a half century ago:

> "If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget, that it is a constitution we are expounding; a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.' When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. * * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'" Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-443 (1934) (citations omitted).

See also, e.g., Dworkin, The Bork Nomination, N.Y. Rev. of Books, Aug. 13, 1987.

Judge Bork himself has admitted that"[m]y own philosophy is interpretivist, but I must say that that put[s] me in a distinct minority among professors." Draft, Address by Judge Bork to the Free Congress Research & Education Foundation (June 14, 1982).

not address women's legal rights -- Judge Bork has precluded the application of the two constitutional rights, equal protection and privacy, that have formed the cornerstone legal protections for women under the Constitution. Because the framers of the fourteenth amendment were not concerned with sex-based discrimination, under Judge Bork's analysis there can be no place for women in the equal protection clause. And, in Judge Bork's view, because it was not explicitly articulated by the framers there is no right to privacy at all.

The fact that Judge Bork's theory of original intent has little place for the adjudication of women's rights under the Constitution is consistent with his articulated view of the judicial resolution of sex discrimination issues. According to Judge Bork, the appropriate forum for the resolution of women's rights is not the Constitution and the courts, but the political arena, an arena unchecked by constitutional requirements and guarantees.* These implications for the constitutional rights

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* Judge Bork's belief that the Constitution is ill-suited to resolving claims of gender discrimination was clearly articulated in the context of his opposition to the Equal Rights Amendment. The following question and answer, from a recent interview, set out his position:

> "Q: [T]en years ago you observed, 'The ERA represents less a revolution in sexual equality than it does a revolution in constitutional government.' What did you mean by that?
>
> "A: I no longer feel free to comment about ERA since I'm now a judge. But I do feel free to explain what I meant ten years ago, which was that the Amendment didn't say that Congress shall have power to provide for sexual equality in all cases, or something of that sort. What it said was, 'Judges shall have power to

of women to equal protection and privacy are clear from Judge Bork's record.

A. Equal Protection

The Supreme Court's determination that women have a special status under the equal protection clause of the fourteenth amendment stands as one of the critical developments in providing constitutional protections for women.

Before 1971, the Supreme Court was of the view that the government could treat men and women differently under the equal protection clause as long as any "rational basis" could be advanced to justify the discriminatory treatment. This analysis gave the government virtually unlimited leeway in treating people differently on the basis of sex. Under the "rational basis" standard, no sex discrimination challenge brought to the Court succeeded. Examples of blatantly sex-discriminatory statutes

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decide what sexual equality is in all cases.' Now the role that men and women should play in society is a highly complex business, and it changes as our culture changes. What I was saying then was that it was a shift in constitutional methods of government to have judges deciding all of those enormously sensitive, highly political, highly cultural issues. If they are to be decided by government, the usual course would be to have them decided by a democratic process in which those questions are argued out."

Guigan, An Interview with Judge Robert H. Bork, Judicial tice, June 1986, at 1, 7-8 (emphasis added).

Judge Bork offers no suggestion as to why questions ncerning sex discrimination are any more difficult or complex - nd undeserving of constitutional/judicial resolution -- than er questions routinely subjected by courts to constitutional lysis. These include discrimination on the basis of race or ional origin, the role of the press in a free society and the rantee of freedom of religion.

that were held not to deny equal protection under the rational basis analysis included a Michigan statute prohibiting all women, except for wives or daughters of male bar owners, from working as bartenders (Goesaert v. Cleary, 335 U.S. 464 (1948)), and a Florida statute relieving only women from jury duty unless they affirmatively registered for it, thereby allowing all male juries (Hoyt v. Florida, 368 U.S. 57 (1961)). See also Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912) ("If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the 14th Amendment does not interfere[.]").

In the landmark decision in Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court departed from the rational-basis standard of review that had permitted wholesale governmental discrimination against women. In Reed, the Court for the first time struck down a sex-discriminatory statute and held that it was denial of equal protection for a state automatically to prefer men over similarly-situated women in appointing administrators for intestate estates.

According to the current analysis, which has come to be known as the "heightened scrutiny" test, the government may treat women and men differently consistent with the requirements of equal protection only where the differential treatment is substantially related to the achievement of an important governmental interest. See, e.g., Mississippi Univ. for Women v.

Hogan, 458 U.S. 717 (1982). Many important kinds of governmental discrimination against women have been struck down under this heightened standard. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (statute allowing servicemen to automatically claim wives as dependents but allowing servicewomen to claim husbands only if they provide half of his support denies equal protection); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (Social Security provision providing payment to widows, but not widowers, with children denies equal protection); Stanton v. Stanton, 421 U.S. 7 (1975) (statute providing higher age of majority for males than females so that males were entitled to parental support for a longer period of time denies equal protection); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (statute giving husband exclusive authority over community property denies equal protection).

According to Judge Bork's beliefs regarding original intent, however, this entire line of cases is necessarily based on a fundamental misreading and misapplication of the fourteenth amendment. Because nothing in the historical record suggests that the framers of the fourteenth amendment were concerned with sex discrimination, under Judge Bork's view the rational basis test must be used instead of heightened scrutiny.

Judge Bork's published views on the proper -- and exceedingly limited -- interpretation of the equal protection clause are at once instructive and threatening to the heightened scrutiny test:

> "The equal protection clause has two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause * * *. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible." Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 11 (1971).[6]

Judge Bork has expressly criticized "the extension of the Equal Protection Clause to groups that were never previously protected":

> "When they begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them.* * * All of these are nationalizations of morality, not justified by anything in the Constitution, justified only by the sentimentalities or the morals of the class to which these judges and their defenders belong." Federalism and Gentrification, Address by Judge Bork to The Federalist Society (Apr. 24, 1982).

Judge Bork is quite clear that if a non-racial inequality is at issue the equal protection clause will not afford a remedy.[7] In a recent article, Judge Bork clearly acknowledges this reading: "The provisions of the Bill of Rights and the Civil War

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[6] Although Judge Bork wrote this article in 1971, as recently as 1985 he described it as representing his philosophy. See McGuigan, supra, at 15.

[7] Judge Bork, while recognizing that racial minorities are protected by the fourteenth amendment, has nonetheless opposed landmark Supreme Court decisions affording protection on the basis of race. For example, he has criticized Shelly v. Kraemer, 334 U.S. (1948), which struck down the use of racially restrictive covenants in deeds. See 47 Ind. L.J., supra, at 15.

amendments not only have contents that protect individual liberties, they also have limits. They do not cover all possible or even all desirable liberties." 23 San Diego L. Rev., supra, at 825.

The practical result of Judge Bork's application of the doctrine of original intent to equal protection analysis is devastating to women's legal rights.* Because women would have no claim to any special status under the equal protection clause according to Judge Bork, their "right to equal protection [would not be] infringed unless the [governmental] policy is not rationally related to a permissible end." Dronenburg v. Zech, 741 F.2d 1388, 1391 (D.C. Cir. 1984) (addressing homosexual's right to equal protection where homosexuality has no special status).

Judge Bork thus would bring women full circle back to the ational basis test. Under this test, women would be left ithout any meaningful claim against governmental sex-based iscrimination. Such a result would fully comport with Judge rk's view that constitutionally-based claims of sex

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* Judge Bork has filed one opinion dealing with a sex-based ual protection claim. However, because he did not reach the estion of the appropriate analysis to apply to the sex-based assification at issue, and because he did not rule on the its of the claim, his statement sheds no further light on his ws regarding the heightened scrutiny standard. See Cosgrove Smith, 697 F.2d 1125, 1145-1146 (D.C. Cir. 1983) (op. curring in part and dissenting in part). In this case, Judge k supported a remand to develop the factual record regarding claim that male District of Columbia prisoners were denied equal protection of the laws where female prisoners may have accorded favorable parole treatment.

discrimination are complex matters not suited for resolution by the courts.

B. Privacy

The constitutional right to privacy was first addressed by the Supreme Court in two cases decided over fifty years ago, which carved out a sphere of familial privacy and integrity with which the state could not constitutionally interfere.' More recent decisions based on this long-standing principle are Griswold v. Connecticut, 381 U.S. 479 (1965), where the Supreme Court struck down a state statute banning the sale or use of contraceptives, even by married couples, and Roe v. Wade, 410 U.S. 113 (1973), the decision guaranteeing a woman's right to choose an abortion. Through the right to privacy the Court has afforded both women and men extremely important constitutionally-based freedoms from state interference in areas that are central to their ability to control their own lives. These include, most importantly, the rights to determine whether and when to bear children and to choose how to raise their children.

Judge Bork has repeatedly stated that he believes that the constitutional right to privacy is not based in the "original intent" of the framers and is therefore not supportable. He has

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' These cases were Meyer v. Nebraska, 262 U.S. 390 (1923) (state prohibition of teaching of modern foreign languages violates fundamental right of parents to control their children's education) and Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (state ordinance requiring children to attend public schools "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

called Griswold "an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it." 47 Ind. L.J., supra, at 9. He recently repeated this criticism in an interview as he stated: "I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision." McGuigan, supra, at 9.

Judge Bork has aggressively attacked the right to privacy in judicial decisions as well as academic publications. For example, in Dronenburg v. Zech, 741 F.2d 1388, in the process of delivering the court's opinion that the Navy was constitutionally free to discharge a petty officer for homosexual conduct, he took the opportunity to lambast the right to privacy as developed by the Supreme Court. In a subsequently filed opinion in this matter, four of Judge Bork's colleagues criticized his opinion as an "extravagant exegesis * * * wholly unnecessary to decide the case before the court." They continued, "Jurists are free to state their personal views in a variety of forums, but the opinions of this court are not proper occasions to throw down gauntlets to the Supreme Court." They concluded in this regard, "Judicial restraint begins at home." Dronenburg v. Zech, 746 F.2d 1579, 1580 (D.C. Cir. 1984) (Robinson, C.J.) (op. dissenting from denial of rehearing en banc).

Judge Bork has candidly elaborated on the ramifications of his extreme views regarding the constitutional right to privacy:

> "It follows, of course, that broad areas of constitutional law ought to be reformulated. Most

> obviously, it follows that substantive due process, [which Judge Bork equates with the privacy right,] revived by the Griswold case, is and always has been an improper doctrine. * * * This means that Griswold's antecedents were also wrongly decided, e.g., Meyer v. Nebraska, which struck down a statute forbidding the teaching of subjects in any language other than English; Pierce v. Society of Sisters, which set aside a statute compelling all Oregon school children to attend public schools * * *." 47 Ind. L.J., supra, at 11 (footnotes omitted).[10]

He further concludes, in no uncertain terms, that Roe v. Wade -- which now hangs by a single vote -- is unconstitutional:

> "I am convinced, as I think most legal scholars are, that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority." The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 310 (1982) (Statement of Robert Bork).

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[10] Judge Bork's criticism of the Supreme Court's recognition of a constitutionally-based privacy right implicitly includes a criticism of the very important line of cases affirming rights of pregnant workers. These decisions were based in substantial part on precisely these privacy-based rights. In the leading case in this area, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), the Court struck down a requirement that all pregnant teachers resign at a fixed point early in their pregnancy regardless of their ability to teach. The decision was based in part on the following analysis:

> "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. * * * [T]here is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'
>
> "By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." Id. at 639, 640.

Judge Bork recently amplified his views regarding constitutionally protected familial privacy rights -- or the lack thereof -- in an opinion dealing with the effort of a non-custodial father to locate and visit with his children who had been relocated along with their mother to an undisclosed destination under the federal Witness Protection Program. In a highly unusual separate statement filed more than a month after the panel opinion, Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983), Judge Bork described the right asserted by the father even to discover the location of his children as "tenuous" and wholly unworthy of constitutional protection. Franz v. United States, 712 F.2d 1428, 1438 (D.C. Cir. 1983) (separate statement, concurring in part and dissenting in part).[11] Judge Edwards, who authored the original panel opinion, filed a response to Judge Bork's separate statement in order "to call attention to the most important of the misstatements and the most troubling of the suggestions contained in the Separate Statement." Id. at 1428.

Judge Bork's dismissal of a constitutional right to privacy based on his philosophy of constitutional interpretation and his specific disapproval of a long line of cases based on that right

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[11] In arguing that constitutional rights are not available to non-traditional parents such as the non-custodial father in Franz, Judge Bork overlooked the Supreme Court's decision in Stanley v. Illinois, 405 U.S. 645 (1972), which extended the full panoply of fourteenth amendment protections to the father of illegitimate children. It did so in language affirming the importance of the parent-child relationship whatever particular form it may take.

demonstrate beyond question that he would allow governmental regulation of the most intimate aspects of sexual and family lives without recourse to the basic constitutional freedoms recognized by the Supreme Court for many decades.

II. JUDGE BORK'S RECORD IS ONE OF LIMITING STATUTORY WOMEN'S RIGHTS.

Judge Bork's judicial interpretations of statutes protecting women's legal rights have much in common with his constitutional analysis. Here, too, the consequences of his written decisions are to limit women's legal rights. While he is an outspoken advocate of the theory of "judicial restraint" in the interpretation and application of statutes as well as the Constitution, emphasizing the limited role of the courts compared to Congress and the primacy of political choices in virtually all instances,[18] in practice he is by no means as consistently restrained and deferential as he argues judges should be. To the contrary, his record strongly suggests that he is "result-oriented," i.e., his awareness of the results of his decisions has shaped his approach to particular cases.

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[18] See, e.g., Dronenburg v. Zech, supra, 741 F.2d at 1397; Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444, 445 (D.C. Cir. 1984) (majority op.); Planned Parenthood Fed'n of America v. Heckler, 712 F.2d 650, 665 (D.C. Cir. 1983) (op. concurring in part and dissenting in part); Bork, The Unpersuasive Bakke Decision, Wall St. J., July 21, 1978.

Our review of Judge Bork's published opinions shows that he has interpreted women's statutory rights narrowly, in ways that adversely affect women's interests in the workplace and elsewhere. Judge Bork has not written many opinions on women's issues. In the cases in which he has, however, the stark fact is that the court would have ruled adversely to women in every one if his views had prevailed.

A. Women in the Workplace

Title VII of the Civil Rights Act of 1964, prohibiting sex-based discrimination in virtually all aspects of employment,[13] is the most important federal law assuring women equitable treatment in seeking and holding jobs. Although Judge Bork does not question that Title VII protects women, as he cannot because the statute explicitly names "sex" as an illegal basis for employment decisions, his record reveals that he nonetheless has interpreted Title VII adversely to women's interests in critical areas.[14]

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[13] Title VII also prohibits employment discrimination based on race, color, religion, and national origin as well as discrimination based on sex.

[14] While our discussion is based on those cases in which Judge Bork has written an opinion, we are aware of three employment discrimination cases in which he was a member of the panel but did not write an opinion. The panels in these three cases ruled unanimously, favorably to women In contrast to the cases in which Judge Bork has written, these cases involved the application of settled principles under Title VII and the Equal Pay Act. Thus, in Palmer v. Shultz, 815 F.2d 84 (D.C. Cir. 1987), the court applied Title VII principles established under Supreme Court and D.C. Circuit precedent to reverse a district court decision dismissing a sex discrimination suit against the Foreign Service and to remand the case for further factfinding

Sexual Harassment. Judge Bork has spoken clearly on the question of sexual harassment on the job. If his views prevailed, Title VII would not afford women meaningful protection from such harassment; sexual harassment is not, he suggests, sex-based discrimination that is prohibited by Title VII with the same force and to the same extent as other types of employment discrimination. This position is evident from his dissenting opinion (from the denial of rehearing en banc) in Vinson v. Taylor, 753 F.2d 141, rehearing denied, 760 F.2d 1330 (D.C. Cir. 1985), aff'd sub nom. Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986), and his "separate statement" (accompanying the denial of rehearing en banc) in King v. Palmer, 778 F.2d 878, 883 (D.C. Cir. 1985). Judge Bork's Vinson dissent is of particular interest and concern. Because Vinson was the landmark case in which a unanimous Supreme Court subsequently held that job-related sexual harassment is prohibited by Title VII, Judge Bork's opinion demonstrates plainly how extreme his views are in this area.

Judge Bork's Vinson dissent questioned whether sexual harassment should be prohibited discrimination at all. He

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and proceedings. In Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985) (per curiam), the court in large part relied on specific rulings made in two previous appeals in the same case to reject much of the airline's appeal and, again, applied clear Supreme Court precedent in determining the back pay award, see id. at 1101-02. Finally, in Ososky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983), the court applied settled law under the Fair Labor Standards Act and plain statutory language to hold the Foreign Service covered by the Equal Pay Act.

asserted: "Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as 'discrimination.' Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove." 760 F.2d at 1333 n.7. This extraordinarily narrow reading of Title VII was flatly rejected by the Supreme Court. Now Chief Justice Rehnquist wrote for the Court that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." Vinson, 106 S.Ct. at 2404 (emphasis added).

In addition to raising the basic question whether job-related sexual harassment violates Title VII, Judge Bork's Vinson dissent argued for more stringent standards of proof of harassment than those announced by the panel opinion or, subsequently, by the Supreme Court. The Vinson case involved sexual harassment that violated Title VII because it created a hostile work environment for the victim.[18] One issue in the case was whether a woman's "voluntary" participation in such an unwelcome sexual relationship, out of fear for her job and job benefits, prevents her from obtaining a legal remedy. The court of appeals ruled that if harassment was unlawfully made a condition of her employment, she could obtain a remedy whether or not she succumbed. 753 F.2d at 145-46.

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[18] Vinson, supra, 753 F.2d at 145, aff'd, 106 S.Ct. at 2404-06. In this regard, the Court of Appeals relied on its earlier ruling in Bundy v. Jackson, 641 F.2d 934, 943-46 (D.C. Cir. 1981).

Judge Bork's dissent, however, vigorously argued that "voluntariness" -- an employee's capitulation -- should be a complete defense to a claim of sexual harassment. See 760 F.2d at 1330-31. Under this approach, the only employee who would be protected against sexual harassment is one who can afford to jeopardize her job, promotion, or other benefits by refusing to capitulate. Yet Judge Bork complained that if the victim's capitulation is not a defense, the kinds of proof allowed in harassment cases "are rigged so that dalliance is automatically harassment * * *." Id. at 1330.[1*]

Judge Bork's position on this point, like his view of sexual harassment itself, was unanimously rejected by the Supreme Court. The Court stated in no uncertain terms that the dispositive issue is whether the supervisor's sexual advances are unwelcome and not whether the employee's participation in "sex-related conduct" is "'voluntary'." 106 S.Ct. at 2406.

[1*] The casual language that Bork uses to describe the unwelcome, heterosexual harassment at issue in Vinson -- e.g., "dalliance" and "sexual escapade" (760 F.2d at 1332) -- contrasts sharply with his description of the consequences of consensual homosexual relationships in Dronenburg v. Zech, supra:

> "Episodes of this sort are certain to be deleterious to morale and discipline, to call into question the even-handedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and, it must be said, given the powers of military superiors over their inferiors, to enhance the possibility of homosexual seduction." 741 F.2d at 1398.

Judge Bork's dissent also condemned the Court of Appeals' ruling that an employer can be held liable for its supervisors' sexually harassing conduct whether or not it was specifically notified of that conduct, 753 F.2d at 147. He maintained that even "[i]f it is proper to classify harassment as discrimination for Title VII purposes," the ordinary statutory protections with regard to an employer's responsibility for discrimination by its supervisors should be relaxed. 760 F.2d at 1332-33 & n.7.[17] In this context, he made two seemingly contradictory (but equally troubling) suggestions: first, that sexual harassment is less significant under Title VII than racial harassment and, second, that racial discrimination, unlike sexual harassment, might have a business purpose. He wrote:

> "[W]e cannot necessarily import wholesale notions of vicarious liability which are evolving in lower court Title VII cases involving racial discrimination. * * * [I]t is extremely unlikely that a supervisor would harass an employee for the purpose of furthering his employer's business. Indeed, supervisors engaging in such harassment (whether or not in violation of an explicit company policy) would ordinarily be aware that their employer disapproved of their actions." Id. at 1331-32 (citation omitted).

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[17] The "adjustment" (760 F.2d at 1333 n.7) Judge Bork advocated has no basis in Title VII law. He cited the D.C. Circuit decision in Bundy v. Jackson, supra, to support his argument that the employer's responsibility should be less in harassment cases, with the result that it would be harder for the victim to prove her case. 760 F.2d at 1331 & n. 4. This citation is misleading. The Bundy court modified a standard Title VII test to make it easier for the victim to prove her case, and did so not because Bundy was a sexual harassment case but because the employer was already a proven discriminator See 641 F.2d at 952.

Thus, he suggested that in cases of sexual harassment -- but not race discrimination -- an employer simply should not be liable for the on-the-job conduct of its supervisors unless the employer itself directly participates in the harassment in some fashion.[18] Judge Bork also rejected precedent from other courts of appeals because "[m]ost of those decisions discuss vicarious liability under Title VII in the somewhat different situation where racial discrimination is at issue." Id. at 1332 n. 5.

Judge Bork's distinction between racial discrimination, including hostile environment racial discrimination, and sexual harassment is without legal merit. It was rejected by the Supreme Court, which equated all hostile environment cases. Thus, after reviewing cases involving discrimination based on national origin, race, and sex, the Court concluded that "'[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.'" 106 S.Ct. at 2406 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).[19]

Judge Bork's view of the "awkwardness" of Title VII's prohibition of sexual harassment in the workplace is apparent also from the "separate statement" he filed in King v. Palmer,

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[18] Judge Bork's implication that a business purpose may underlie racial discrimination itself raises troubling questions with respect to his views of race discrimination.

[19] See also Vinson, 106 S.Ct. at 2408 (relying on race-based hostile environment case to discuss employer liability).

supra. In King, the plaintiff was a female employee who was denied a promotion because of a sexual relationship between her supervisor and another employee, who was promoted instead. The court held that the plaintiff could prevail on her Title VII claim without offering direct evidence of intentional discrimination or proof that the sexual relationship had been consummated. See 778 F.2d at 881-82. The employer sought rehearing en banc, which was denied.

Judge Bork, who was not on the King panel and voted to deny rehearing, nonetheless took the opportunity to question Title VII coverage, in an apparent attempt to limit the reach of the panel opinion. He filed a concurring statement to explain why the court had denied the motion of the United States, which was not a party in the case, for time to consider filing an amicus brief on the scope of Title VII coverage. In the course of that explanation, Judge Bork asserted that the panel had not actually decided whether Title VII applied at all where "a women * * * alleges that she was denied a promotion in favor of another woman who had a sexual relationship with their supervisor," 778 F.2d at 883, because the parties had not raised the issue. Thus, as he had in Franz v. United States, supra, he used an extraordinary procedure to state his views. Moreover, his contention was not correct since the King panel specifically noted its agreement with the district court that the plaintiff's claim was cognizable "under statutes prohibiting sex discrimination in employment." 778 F.2d at 880.

Affirmative Action. Like sexual harassment, affirmative action is a critical issue for women in the workplace, where Judge Bork's narrow interpretation of the law is adverse to women's interests. His writings suggest that he would narrow, if not abolish, remedial affirmative action, with the effect of narrowing women's access to jobs, promotions, and better pay.

The constitutional and statutory validity and importance of remedial affirmative action in appropriate circumstances has been recognized repeatedly by the Supreme Court in the nine years since Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), reached the Court.[10] Just last Term, the Supreme Court decided its first case involving sex-based affirmative action. Johnson v. Transportation Agency, 107 S.Ct. 1442 (1987), holds that Title VII permits an employer to take sex into account in making promotions, pursuant to a voluntarily-adopted plan to remedy a "manifest [sex] imbalance" in traditionally segregated job categories. This ruling allowed a well-qualified woman to be promoted into a skilled craft job classification in which none of the 238 positions previously was held by a woman. 107 S.Ct. at 1446-47.

Although Judge Bork has not written extensively on affirmative action, his commentary on the Supreme Court's initial

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[10] See, e.g., United States v. Paradise, 107 S.Ct. 1053 (1987) (fourteenth amendment permits race-conscious promotions under court order); Local No. 93 v. City of Cleveland, 106 S.Ct. 3063 (1986) (Title VII permits race-conscious promotions under consent decree); Local 28 v. Equal Employment Opportunity Comm'n, 106 S.Ct. 3019 (1986) (Title VII permits race-conscious hiring under court order).

affirmative action decision in Bakke, supra, strongly suggests that he would disagree with Johnson. This commentary shows that he does not interpret the fourteenth amendment (or Title VII as it applies to public employers as in Johnson), to permit the use of any affirmative action, such as goals and timetables, to place women in jobs from which they historically have been excluded.

The theory underlying affirmative action is that race- or sex-conscious decisionmaking is acceptable when it is necessary and appropriate to remedy the present effects of demonstrated historical discrimination against a group of individuals.[21] That theory has been categorically rejected by Judge Bork. With regard to the Bakke decision, he writes that "[t]he argument offends both ideas of common justice and the 14th Amendment's guarantee of equal protection to persons, not classes." Bork, The Unpersuasive Bakke Decision, Wall St. J., July 21, 1978. His adherence to that view would preclude him from approving any affirmative action, as that term is commonly understood, under the Constitution and in cases like Johnson as well. Accordingly, he would deny women a powerful tool to overcome the effects of long-standing employment discrimination.

B. Women's Health

Judge Bork's narrow view of women's statutory rights is not confined to Title VII. In Oil, Chemical & Atomic Workers Int'l

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[21] See Bakke, 438 U.S. at 309 (Powell, J.); id. at 325 (Brennan, J.) (race); see also, e.g., Johnson, supra, 107 S.Ct. at 1452 (sex); United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (race).

Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984), he concluded that the Occupational Safety and Health Act of 1970 did not ban an employer's "fetus protection policy" that permitted women of childbearing age to work in a certain plant department only if they were surgically sterilized. Judge Bork admitted the Act "can be read, albeit with some semantic distortion, to cover the sterilization exception contained in American Cyanamid's fetus protection policy." 741 F.2d at 447.[22]. Nonetheless, he looked to "precedent, usage, and congressional intent," id. at 448, to conclude that the policy was not covered and therefore not prohibited. He said: "The women involved in this matter were put to a most unhappy choice. But no statute redresses all grievances, and we must decide cases according to law." Id. at 450.[23]

Judge Bork took a markedly different approach in Planned Parenthood Fed'n of America v. Heckler, 712 F.2d 650 (D.C. Cir. 1983), to advocate a result similarly adverse to women's legal interests. There, he wrote an opinion that did not just interpret statutory language and apply its policy, but also showed how that policy could be circumvented. The Planned

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[22] The Act requires employers to provide "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm * * *." 29 U.S.C. § 654(a)(1).

[23] Judge Bork similarly protested in Vinson that he was constrained not to reach a result that would afford redress. See Vinson, supra, 760 F.2d at 1333 n.7 ("Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior * * *.").

Parenthood case struck down the so-called "squeal rule" promulgated by the Department of Health and Human Services, which required recipients of federal family planning services grants to notify parents or guardians when prescription contraceptives were provided to minors. The court found that the 1981 amendment to Title X of the Public Health Service Act, upon which the agency relied, did not authorize the rules; instead, the court said, "these regulations not only violate Congress' specific intent as to the issue of parental notification, but also undermine the fundamental purposes of the Title X program." 712 F.2d at 656.

Judge Bork concurred in the judgment that Title X did not authorize the rule. Id. at 665. Nonetheless, he dissented from the disposition of the case, contending that the case should have been remanded to the agency for reconsideration because "it is arguable that the agency could correct its initial errors and lawfully reissue the rule." Id. at 667. He went on to explain how, in his view, the rule could lawfully be reissued. See id. at 667-68. Although Judge Bork couched his opinion in the language of restraint, claiming that the majority had decided too much, id. at 667, his own approach was plainly unrestrained as he instructed the agency how to achieve its purpose. Further, as the majority pointed out, the remand he called for was wholly unnecessary since the agency was always "free to issue new and different regulations" consistent with congressional intent. 712 F.2d at 665 n.*.

In sum, although Judge Bork professes judicial restraint in the application of statutes, the results that he reached in all of the cases described above are remarkably consistent on the merits and plainly inconsistent with respect to the degree of restraint he exercised. Even where doing so required an active judicial posture, Judge Bork advocated a result adverse to women's interests in every one.

III. JUDGE BORK IS A JUDICIAL ACTIVIST WHO STRIVES TO IMPLEMENT HIS VIEWS.

While it is impossible to predict with precision Judge Bork's votes as a Supreme Court justice, there is every reason to conclude that he would actively seek to implement his views with respect to the Constitution, and that he would continue his judicial record of restrictive interpretations of women's statutory rights.

Judge Bork's judicial record profiled in this report stands out not only because of the results he has reached, but also because of the aggressive way in which he has sought to advance his views. On the basis of his own words, as well as his record on the bench, it is clear that he would be an activist justice.[24]

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[24] This activism is manifest in the unusual steps he has taken to articulate his positions. For example, in the sexual harassment case, King v. Palmer, supra, he filed a statement concurring in the denial of rehearing en banc, on the denial of the motion of the United States for time to consider filing an amicus brief. In Franz v. United States, supra, he filed a separate statement to express his position not when the panel opinion was issued, but more than a month later. See 712 F.2d at 1428.

Moreover, as a Supreme Court justice, Judge Bork would be free to overturn Supreme Court precedents, when, as a judge on the Court of Appeals he has been bound to follow them. Judge Bork has stated that he will, in fact, follow his own constitutional theory, and he should be taken at his word.

Judge Bork's long-held and well-documented views regarding the appropriate mode of constitutional interpretation cannot be dismissed as the scholarly musings of a conservative and provocative academician that are not likely to be put into practice.[**] To the contrary, the full range of his writings and statements strongly suggests that he believes that Supreme Court justices should disregard precedent if it conflicts with their view of proper constitutional interpretation.

Judge Bork stated his views on constitutional precedent most baldly in the confirmation hearings on his nomination to the U.S. Court of Appeals for the District of Columbia Circuit: "The only cure for a Court which oversteps its bounds that I know of is the appointment power[.]" Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 7

[**] In a recent interview Judge Bork affirmed the constancy of his views regarding the proper role of the courts. When asked if his views in this regard had changed since he became a judge, he responded in the negative: "[T]he fact is no, my views have remained about what they were. After all, courts are not that mysterious, and if you deal with them enough and teach their opinions enough, you're likely to know a great deal. So when you become a judge I don't think your viewpoint is likely to change greatly." Lacovara, A Talk with Judge Robert H. Bork, Dist. Law., June 1985, at 29, 31.

(1982) (Testimony of Robert H. Bork).[16] He elaborated: "For example, if a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court." Id. at 13. See also Deniston, supra, at 25:

> "Q: Justice William H. Rehnquist, for example, articulates his theory that in dealing with constitutional litigation at the Supreme Court level, a justice should be freer to reinterpret past doctrine than he would if he were looking at a new statutory situation. Should a Supreme Court justice be freer than a lower court judge to reverse or overrule existing precedent?
>
> "A: That's not peculiar to Justice Rehnquist. That is a standard understanding of the Supreme Court's function. A Supreme Court justice always can say, and many times the Supreme Court has said, that their first obligation is to the Constitution, not to what their colleagues said 10 years before."[17]

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[16] See also Bork, Society, supra, at 6. ("Democratic responses to judicial excesses probably must come through the replacement of judges who die or retire with new judges of different views.")

[17] Formal adherence to precedent is not the only consideration in determining whether a judge truly observes the doctrine of stare decisis in decision making. A judge's actual record in applying precedent is also highly relevant to the inquiry. Even where, as a circuit court judge, Judge Bork frequently stated that he was bound by Supreme Court precedent, see, e.g., Dronenburg v. Zech, 741 F.2d at 1396 n. 5; Franz v. United States, 712 F.2d at 1438, he showed a willingness to interpret precedent loosely to support his ends. For example, in Franz v. United States, supra, he would not have accorded any constitutional rights to the father despite his free acknowledgement that "the [Supreme] Court has fashioned both a substantive and procedural constitutional law of family relations * * *." 712 F.2d at 1438. Nothing in Judge Bork's record suggests that he will follow precedent with which he does not agree.

Judge Bork has suggested that certain categories of constitutional decision-making are, although wrong, so deeply entrenched that it would do serious damage to revise them. The example he often cites is long-standing Supreme Court interpretation of the commerce clause. See Lacovara, supra, at 32; Deniston, supra, at 7. Judge Bork's writings demonstrate, however, that he does not so regard the comparatively recent lines of equal protection and private cases discussed in this report. He has said that there is "no principled way of saying which non-racial inequalities are impermissible under the fourteenth amendment," 47 Ind. L.J., supra, at 11; and called the Griswold decision "unprincipled," id. at 9, and Roe v. Wade "unconstitutional," The Human Life Bill: Hearings on S. 158, supra, at 310. This month, in fact, an article published in The New York Times quotes Senator Bob Packwood describing a conversation he had with Judge Bork about the value of precedent. According to the Senator, Judge Bork "said certain precedents were so fixed, some issues so settled, that regardless of how you felt about them you shouldn't vote to overrule them. He did not include Roe v. Wade in that category." Greenhouse, No Grass is Growing Under Judge Bork's Feet, N.Y. Times, Aug. 4, 1987, at 18.

A review of the full range of Judge Bork's writings and decisions as they affect the legal rights of women thus leaves little question as to the approach he would take as a Supreme Court justice. The record demonstrates that, if confirmed, Judge

Bork will actively seek to implement his views, both constitutional and statutory, giving little deference in the process to the Supreme Court precedents that have expanded women's legal rights in fundamental ways.

CONCLUSION

Judge Bork combines a narrow view of the constitutional protections provided for women with a limited reading of Congressional statutes enacted to enhance their rights. In basic respects, he challenges the validity and supports the reversal of precedents fundamental to women's legal rights, which have become a part of our legal framework, and upon which more recent decisions rely and expand. He advocates a view of the courts and the Constitution that is deeply inimical to the equality of women before the law.

In sum, at stake in Judge Bork's nomination to the Supreme Court are women's role in the workplace, their access to educational opportunities, their health and reproductive rights, their status as citizens with full rights to equal treatment by our government, and even their rights as parents. The role of the courts in securing these rights will be far more restricted if Judge Bork's views prevail, with profound consequences for women to follow.

NWPC NATIONAL WOMEN'S POLITICAL CAUCUS
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STATEMENT OF IRENE NATIVIDAD

CHAIR, NATIONAL WOMEN'S POLITICAL CAUCUS

FOR THE SENATE COMMITTEE ON THE JUDICIARY

ON THE NOMINATION OF JUDGE ROBERT BORK TO BE A JUSTICE

OF THE U.S. SUPREME COURT

OCTOBER 5, 1987

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR THE OPPORTUNITY TO MAKE THIS STATEMENT. I AM IRENE NATIVIDAD, CHAIR OF THE NATIONAL WOMEN'S POLITICAL CAUCUS, A NATIONWIDE, MULTIPARTISAN ORGANIZATION WITH 77,000 MEMBERS IN 300 STATE AND LOCAL CAUCUSES. WE WORK TO WIN FOR WOMEN EQUAL REPRESENTATION IN ELECTIVE AND APPOINTIVE OFFICE AND WE SPEAK OUT ON ISSUES OF DIRECT CONCERN TO WOMEN. WOMEN'S FULL RIGHTS AS CITIZENS ARE DEPENDENT ON THE COURT'S INTERPRETATION OF THE FOURTEENTH AMENDMENT AND OF LAWS PASSED BY CONGRESS.

WE STRONGLY OPPOSE THE NOMINATION OF JUDGE ROBERT BORK TO BE A JUSTICE OF THE U.S. SUPREME COURT BECAUSE HIS LEGAL PHILOSOPHY OF APPLYING THE "ORIGINAL UNDERSTANDING" OF THE FRAMERS WILL BE ADVERSE TO WOMEN'S RIGHTS. IN ADDITION WE ARE CONCERNED ABOUT -

- HIS GENERALLY CRABBED, GRUDGING VIEW OF INDIVIDUAL RIGHTS UNDER THE CONSTITUTION;
- HIS VIEWS ON THE LIMITED SCOPE OF THE FOURTEENTH AMENDMENT AS IT APPLIES TO RACE DISCRIMINATION;

- HIS STRIDENT REJECTION OF THE PRIVACY DOCTRINE;
- HIS RESTRICTIVE VIEWS ON STANDING TO SUE;
- HIS REJECTION OF THE NINTH AMENDMENT;
- HIS RESTRICTIVE INTERPRETATION OF THE FIRST AMENDMENT;
- HIS CONTEMPT FOR THE DRAFTING OF THE BILL OF RIGHTS;
- HIS VIEWS ON THE POWER OF THE PRESIDENT RELATIVE TO CONGRESS;
- HIS ANTI-TRUST VIEWS;
- HIS INTEMPERATE CRITICISM OF SUPREME COURT PRECEDENTS COUPLED WITH HIS VIEWS ON STARE DECISIS

I SHALL LIMIT MY DETAILED COMMENTS TO JUDGE BORK'S VIEWS ON THE CONSTITUTIONAL STATUS OF WOMEN. OTHER WITNESSES HAVE SPOKEN TO OUR OTHER CONCERNS IN DETAIL.

JUDGE BORK IN HIS WRITINGS AND SPEAKING HAS OPPOSED ANY CONSTITUTIONAL PROTECTION FOR SEX DISCRIMINATION - HAVING OPPOSED THE EQUAL RIGHTS AMENDMENT AND, UNTIL THE HEARINGS, THE COVERAGE OF SEX DISCRIMINATION BY THE FOURTEENTH AMENDMENT.

JUDGE BORK'S VIEWS ON GENDER DISCRIMINATION AND THE CONSTITUTION ARE CLEARLY ARTICULATED IN THE CONTEXT OF HIS OPPOSITION TO THE EQUAL RIGHTS AMENDMENT. THE FOLLOWING QUESTION AND ANSWER, FROM A RECENT INTERVIEW, STATES HIS ATTITUDE:

> Q: TEN YEARS AGO YOU OBSERVED, "THE ERA REPRESENTS LESS A REVOLUTION IN SEXUAL EQUALITY THAN IT DOES A REVOLUTION IN CONSTITUTIONAL GOVERNMENT." WHAT DID YOU MEAN BY THAT?
>
> A: I NO LONGER FEEL FREE TO COMMENT ABOUT ERA SINCE I'M NOW A JUDGE. BUT I DO FEEL FREE TO EXPLAIN WHAT I MEANT TEN YEARS AGO, WHICH WAS THAT THE AMENDMENT DIDN'T SAY THAT CONGRESS SHALL HAVE POWER TO PROVIDE FOR SEXUAL EQUALITY IN ALL CASES, OR SOMETHING OF THAT SORT. WHAT IT SAID WAS, "JUDGES SHALL HAVE POWER TO DECIDE WHAT SEXUAL EQUALITY WAS IN ALL CASES." NOW THE ROLE THAT MEN AND WOMEN SHOULD PLAY IN

> SOCIETY IS A HIGHLY COMPLEX BUSINESS, AND IT CHANGES AS OUR CULTURE CHANGES. WHAT I WAS SAYING THEN WAS THAT IT WAS A SHIFT IN THE CONSTITUTIONAL METHODS OF GOVERNMENT TO HAVE JUDGES DECIDING ALL OF THOSE ENORMOUSLY SENSITIVE, HIGHLY POLITICAL, HIGHLY CULTURAL ISSUES. IF THEY ARE TO BE DECIDED BY GOVERNMENT, THE USUAL COURSE WOULD BE TO HAVE THEM DECIDED BY A DEMOCRATIC PROCESS IN WHICH THOSE QUESTIONS ARE ARGUED OUT.[1]

ALTHOUGH JUDGE BORK MAKES A FETISH OF ORIGINAL INTENT, HE IGNORED THE LEGISLATIVE HISTORY OF THE EQUAL RIGHTS AMENDMENT, WHICH SPELLED OUT THE INTENT OF THE FRAMERS IN THE "COMPLEX" AREAS, INCLUDING TOILETS AND ASSIGNMENT OF WOMEN IN THE MILITARY - OLD CHESTNUTS WHICH HE HAD THE TEMERITY TO RAISE IN THE HEARING. DID HE FEEL THAT WOMEN'S RIGHTS WERE SO TRIVIAL AND UNIMPORTANT THAT HE DIDN'T HAVE TO RESEARCH THE LEGISLATIVE HISTORY BEFORE EXPRESSING AN OPINION?

JUDGE BORK ALSO IGNORED THE FACT THAT JUDGES NOW ARE DECIDING THESE COMPLEX ISSUES UNDER THE FOURTEENTH AMENDMENT WITHOUT ANY GUIDANCE FROM THE CONGRESS AS TO INTENT. NOR DOES HE SPELL OUT WHY QUESTIONS CONCERNING SEX DISCRIMINATION ARE MORE COMPLEX OR DIFFICULT THAN OTHER QUESTIONS ROUTINELY SUBJECTED TO CONSTITUTIONAL ANALYSIS BY THE COURTS.

I AM DISTURBED BY HIS WORDS QUOTED ABOVE "THE ROLE MEN AND WOMEN <u>SHOULD</u> PLAY IN SOCIETY" INDICATING AN ASSUMPTION THAT SOCIETY (THE MAJORITY?) SHOULD DICTATE ROLES FOR MEN AND WOMEN WITH NO INDIVIDUAL FREEDOM TO CHOOSE, A POINT OF VIEW IN HARMONY WITH HIS MAJORITARIAN VIEWS BUT ANTITHETICAL TO WOMEN'S RIGHTS.

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[1] McGuigan, "An Interview with Judge Robert H. Bork," <u>Judicial Notice</u>, June 1986, as quoted in <u>Setting the Record Straight: Judge Bork and the Future of Women's Rights</u>, National Women's Law Center, Washington, D.C.

IN HIS WRITINGS JUDGE BORK HOLDS, IN LINE WITH HIS JUDICIAL PHILOSOPHY OF ORIGINAL INTENT, THAT THE EQUAL PROTECTION CLAUSE APPLIES ONLY TO RACE. LATER HE ADDS ETHNIC AND RELIGIOUS MINORITIES.

IN THE FAMOUS INDIANA LAW REVIEW ARTICLE, HE SAYS:

> IT (THE EQUAL PROTECTION CLAUSE) CAN REQUIRE FORMAL PROCEDURAL EQUALITY, AND BECAUSE OF ITS HISTORICAL ORIGINS, IT DOES REQUIRE THAT GOVERNMENT NOT DISCRIMINATE ALONG RACIAL LINES. BUT MUCH MORE THAN THAT CANNOT PROPERLY BE READ INTO THE CLAUSE. "NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS." 47 INDIANA LAW REVIEW 1, 11, 1971.

HOWEVER, BY 1984, HE HAS ENLARGED THE SCOPE TO INCLUDE ETHNIC AND RELIGIOUS MINORITIES, WITHOUT SQUARING IT WITH HIS PHILOSOPHY OF ORIGINAL INTENT:

> THE CONSTITUTION HAS PROVISIONS THAT CREATE SPECIFIC RIGHTS. THESE PROTECT, AMONG OTHERS, RACIAL, ETHNIC, AND RELIGIOUS MINORITIES. DRONENBERGER V. ZECH, 741 F.2d 1388, 1397 (D.C. CIR. 1984)

THE MOST ARDENT AND VOCAL OPPONENTS OF THE ERA AGREED THAT SEX DISCRIMINATION SHOULD BE PROHIBITED CONSTITUTIONALLY BUT ARGUED THAT THE ERA WASN'T NEEDED BECAUSE THE FOURTEENTH AMENDMENT PROHIBITED SEX DISCRIMINATION. THEIR ARGUMENT WAS BUTTRESSED BY THE FACT THAT, BEGINNING IN 1971, THE SUPREME COURT HAD STRUCK DOWN SOME GOVERNMENTAL LAWS AND REGULATIONS THAT DISCRIMINATED ON THE BASIS OF SEX. IN REED V. REED[1] THE COURT INVALIDATED A STATE LAW THAT AUTOMATICALLY FAVORED A FATHER OVER A MOTHER AS EXECUTOR OF THEIR SON'S ESTATE. IN FRONTIERO V. RICHARDSON[2] THE COURT STRUCK DOWN A FEDERAL LAW REQUIRING WOMEN IN THE MILITARY TO PROVE THEIR HUSBANDS' DEPENDENCE ON THEM IN ORDER FOR THE HUSBANDS TO RECEIVE DEPENDENTS' BENEFITS, WHILE PRESUMING WITHOUT SUCH PROOF THAT THE WIVES OF ALL MEN IN THE MILITARY ARE DEPENDENT.

[1] 404 U.S. 71 (1971) [2] 411 U.S. 677 (1973)

IN WEINBERGER V. WIESENFELD[1] THE COURT INVALIDATED A SOCIAL SECURITY LAW THAT PAYS WIDOWS WITH SMALL CHILDREN, BUT NOT WIDOWERS WITH SMALL CHILDREN, SURVIVORS' BENEFITS. STANTON V. STANTON[2] HELD THAT STATES CANNOT SET DIFFERENT AGES AT WHICH MEN AND WOMEN ARE CONSIDERED ADULTS UNDER THE LAW. UTAH HAD SET THE AGE OF ADULTHOOD AT 18 FOR WOMEN AND 21 FOR MEN, REASONING THAT MEN NEEDED A LONGER PERIOD OF PARENTAL SUPPORT IN ORDER TO OBTAIN THEIR EDUCATION. THE COURT WROTE: "NO LONGER IS THE FEMALE DESTINED SOLELY FOR THE HOUSE AND THE REARING OF FAMILY AND ONLY THE MALE FOR THE MARKETPLACE AND WORLD OF IDEAS."

KIRCHBERG V. FEENSTRA[3] STRUCK DOWN A LOUISIANA LAW GIVING HUSBANDS EXCLUSIVE AUTHORITY OVER COMMUNITY PROPERTY. JUSTICE O'CONNOR WROTE THE OPINION IN MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN[4] REQUIRING THE UNIVERSITY TO ADMIT MEN TO ITS NURSING SCHOOL. SHE SAID, "RATHER THAN COMPENSATING FOR DISCRIMINATORY BARRIERS FACED BY WOMEN (THE UNIVERSITY'S JUSTIFICATION FOR ADMITTING ONLY WOMEN), MUW'S POLICY OF EXCLUDING MALES FROM ADMISSION TO THE SCHOOL OF NURSING TENDS TO PERPETUATE THE STEREOTYPED VIEW OF NURSING AS AN EXCLUSIVELY WOMEN'S JOB." A FOOTNOTE SUGGESTS THAT EXCLUDING MEN FROM NURSING HAS DEPRESSED NURSES' WAGES.

UNDER PRESENT SUPREME COURT DOCTRINE, AS IT HAS EVOLVED FROM THESE AND OTHER CASES, THE COURT WILL INVALIDATE SEX DISCRIMINATORY LAWS UNLESS THE DIFFERENTIAL TREATMENT IS SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF AN IMPORTANT GOVERNMENTAL INTEREST. ALTHOUGH THIS REMEDY FOR DISCRIMINATION IS BY NO MEANS AN ADEQUATE SUBSTITUTE FOR THE EQUAL RIGHTS AMENDMENT, IT IS THE ONLY AVENUE OPEN TO WOMEN NOW FOR ACHIEVING EQUALITY UNDER THE LAW. JUDGE BORK WOULD SLAM THIS HALF-OPEN DOOR IN OUR FACES.

[1]420 U.S. 636 (1975) [2]421 U.S. 7 (1975) [3]450 U.S. 455 (1981) [4]458U.S. 717 (1982)

IN TESTIMONY BEFORE THIS COMMITTEE, JUDGE BORK SUDDENLY CHANGED HIS LONG AND STRONGLY HELD VIEW THAT SEX DISCRIMINATION WAS NOT COVERED UNDER THE 14th AMENDMENT. IN CONSIDERING SUCH CASES HE PROPOSED TO APPLY AN UNDEFINED STANDARD OF "REASONABLENESS" ADVOCATED BY JUSTICE STEVENSON IN CRAIG V. BOREN[1]. IN THAT CASE JUSTICE STEVENSON HAD VOTED TO STRIKE DOWN A STATE LAW SETTING A DIFFERENT DRINKING AGE FOR MEN AND WOMEN. ONLY A FEW MONTHS BEFORE BEING NOMINATED FOR THE SUPREME COURT, JUDGE BORK HAD CALLED THE DECISION IN CRAIG A "TRIVIALIZATION" OF THE CONSTITUTION.

JUDGE BORK ALSO IMPLIED THAT HE WOULD BE MORE LIKELY TO UPHOLD PAST DECISIONS OF THE SUPREME COURT WITH WHICH HE DISAGREED THAN HIS PREVIOUS SPEECHES, WRITINGS AND DECISIONS WOULD INDICATE.

I AGREE WITH BARBARA JORDAN, WHO SAID THAT JUDGE BORK'S CHANGES IN POSITION ON THESE AND OTHER PREVIOUSLY STRONGLY HELD VIEWS LEFT HER "INCREDULOUS."

ASSUMING THE MOST FAVORABLE INTERPRETATION OF HIS TESTIMONY - THAT HE WOULD NOT SEEK TO OVERTURN PREVIOUS 14th AMENDMENT DECISIONS STRIKING DOWN SEX DISCRIMINATORY LAWS - HIS "JUDGING PHILOSOPHY" WOULD PRECLUDE HIS VOTING TO EXTEND COVERAGE TO A DIFFERENT FACT SITUATION. FOR EXAMPLE, IT SEEMS HIGHLY IMPROBABLE THAT HE WOULD VOTE TO STRIKE DOWN DISCRIMINATORY PRACTICES IN PUBLIC EDUCATION, SUCH AS DISCRIMINATION IN ATHLETICS. THERE IS AT LEAST ONE CASE RAISING THIS ISSUE IN THE PIPELINE THAT MIGHT REACH THE SUPREME COURT.

ALTHOUGH JUDGE BORK RECANTED ON A NUMBER OF PREVIOUSLY HELD POSITIONS, HE STUCK TO HIS BASIC "JUDGING PHILOSOPHY" OF APPLYING "ORIGINAL UNDERSTANDING" OF THE FRAMERS.

ONE OF THE MOST DISTURBING ASPECTS OF JUDGE BORK'S WRITINGS IS HIS NEED TO FIND AN OVER ARCHING THEORY THAT WOULD PROVIDE CERTITUDE IN REACHING DECISIONS. HE SEEMS TO BE SEEKING AN ESCAPE FROM THE AMBIGUITIES AND UNCERTAINTY

[1] 429 U.S. 190 (1970)

IN LIFE AND THE LAW.

I HAVE ALSO BEEN IMPRESSED IN READING JUDGE BORK'S WRITINGS AND DECISIONS WITH A TOTAL LACK OF EXPRESSED CONCERN FOR HUMAN BEINGS - A DETACHMENT FROM REAL LIFE AND REAL PEOPLE. HE SAID IN THE HEARING THAT HE AGREED WITH THE RESULTS REACHED IN MANY CASES THAT HE HAD CRITICIZED FOR LACK OF SOUND REASONING. WHEN QUESTIONED BY SENATORS AS TO WHETHER HE HAD THOUGHT ABOUT OTHER MORE ACCEPTABLE REASINING FOR REACHING THE RESULT, HE REPLIED HE HAD NOT - A RATHER SURPRISING RESPONSE FROM A MAN OF HIS BRILLIANCE AND CURIOSITY.

IN SUMMARY, WE OPPOSE THE APPOINTMENT OF JUDGE BORK TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT, BECAUSE WE BELIEVE HIS PRESENCE ON THE COURT WOULD BE A NEGATIVE INFLUENCE IN MOVING THIS NATION TOWARD ITS IDEALS.

Natural Resources
Defense Council

122 East 42nd Street
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212 949-0049

September 22, 1987

Hon. Joseph R. Biden,
Chairman
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

We write to register the opposition of the Natural Resources Defense Council, Inc. to the confirmation of Judge Robert H. Bork to the Supreme Court of the United States. Since its founding in 1970, NRDC has not taken positions regarding judicial appointments. However, aspects of Judge Bork's record relevant to our organization and its objectives concern us so intensely that we must state our views in this instance.

NRDC is a national, nonprofit membership organization dedicated to the protection of the environment. In pursuing that objective we seek enactment of laws to improve environmental protection and appear regularly before government agencies and the courts to ensure compliance with those laws. While we make major efforts to negotiate mutually satisfactory resolutions of disputes with government agencies and private parties, it is sometimes necessary for us to seek the assistance of the courts in enforcing the law. Moreover, in the many instances where negotiations are successful it is in large part because all participants know that the courts are available to resolve disputes where the parties cannot.

In short, access to the courts is essential to our ability to play an effective role in securing compliance with environmental laws. Because of the importance of federal statutes in this area, access to the federal courts is critical. We need that access, not to create new law but to enforce the laws that Congress has written.

Judge Bork's record on access issues is the principal basis for our opposition to his confirmation. As is discussed in the attached memorandum, Judge Bork's frequently expressed opinion is that litigation

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617 [illegible]

regarding environmental laws and other remedial legislation (which he disparages as "legally trivial") does not belong in the federal courts. Judge Bork's views on access issues indicate that he would read the Constitution to bar federal courts from hearing many cases that arise when governmental agencies or private firms violate environmental laws. In our view, to close the courthouse door to environmental interests would invite illegality by the nation's polluters, jeopardizing vital natural resources and human health.

Second, we are concerned that Judge Bork's record indicates that he finds it more difficult to rule against the government when it is sued by "public interest" litigants than when it is sued by the regulated industry. Our memorandum reviews thirty-six cases in both categories and documents a clear pattern: Judge Bork is willing to overturn governmental action when business interests are at stake but rarely otherwise.

We believe Congress itself should regard Judge Bork's views as adverse to its interest in having legislative decisions respected by the executive branch. Government agencies are frequently confronted by two diametrically opposed voices when they interpret legislation: regulated industries arguing for more lenient rules and groups like ours arguing for more protective rules. If only regulated industries may have their day in court in such disputes, agencies will inevitably give more and more weight to industries' arguments and less and less weight to arguments presented by groups that cannot receive a court hearing. This result would guarantee that major environmental laws, such as the Clean Air and Water Acts, Safe Drinking Water Act, and laws to control hazardous waste, would be severely weakened by a one-sided deliberative process in the executive branch.

Because we believe Judge Bork's views, if embraced by a majority of the Supreme Court, would unreasonably increase the power of the executive branch and regulated industries at the expense of the Congress and the public it represents, we oppose his confirmation.

Thank you for considering our views on this important matter. Please include this letter and the attached memorandum in the record.

Sincerely,

Adrian W. DeWind
Chairman

A D D E N D U M

The following are changes to the NRDC Board of Trustees:

Mr. Thomas C. Jorling left the board for public office in New York

Judge Wade Hampton McCree, Jr. died in August

Additions to the NRDC Board of Trustees:

Mr. Charles E. Koob

Justice Cruz Reynoso

Mr. Frederick A.O. Schwarz, Jr.

Natural Resources
Defense Council

122 East 42nd Street
New York, New York 10168
212 949-0049

September 22, 1987

MEMORANDUM

TO: Members of the U.S. Senate

RE: Opposition to Judge Robert H. Bork's Nomination to Supreme Court

FROM: Natural Resources Defense Council, Inc.

INTRODUCTION

The Natural Resources Defense Council, Inc. (NRDC) has not taken positions in the past opposing or supporting nominees to the federal courts. Following the President's nomination of Judge Robert H. Bork to the U.S. Supreme Court NRDC's Board of Trustees met to consider whether NRDC should take a position on this nomination.

SUMMARY

NRDC has reviewed Judge Bork's judicial record and publicly available evaluations of his opinions in cases directly relating to NRDC as an environmental litigating organization. Based on that record we have concluded that Judge Bork's appointment to the Supreme Court would seriously threaten the ability of NRDC and other membership organizations to protect their members' and the public's interests in enforcing environmental laws in the federal courts.

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90-939 O - 89 - 14

DISCUSSION

NRDC's opposition to Judge Bork's confirmation is based on his positions on the issues of access to the courts and on deference to decisions of government agencies.

NRDC is a nonprofit, national membership organization dedicated to the protection of the environment. In pursuing that objective we seek enactment of laws to improve environmental protection and appear before government agencies and the courts to ensure compliance with those laws. While we make major efforts to negotiate mutually satisfactory resolutions of disputes with government agencies and private parties, it is sometimes necessary for us to seek the assistance of the courts in enforcing the law. Moreover, in the many instances where negotiations are successful it is in large part because all participants know that the courts are available to resolve disputes where the parties cannot.

Most of NRDC's lawsuits are brought against the government, either to overturn approval of an environmentally damaging activity, to force adoption of needed environmental regulation, or to improve inadequate environmental regulation. To prevail in our cases NRDC first must show that the court should hear the case and second, must persuade the court to find the government's position unlawful. The rules and doctrines relating to the first of these hurdles are loosely termed "access to the courts." Regarding the second hurdle, the most important doctrine is that of "deference" to government agency decisionmaking.

A. Access to the Courts

An analysis of Judge Bork's voting record in nonunanimous cases identifies 14 decisions on access to the courts in which Judge Bork participated.[1] In all 14 of the cases he voted to deny access.[2]

Judge Bork's views on the types of cases that merit the attention of the federal courts offer a plausible explanation for his record restricting access. His view, stated prior to becoming a judge, is that the federal court docket is unreasonably congested as a result of an "immense quantity of legal trivia that a welfare state generates." Bork, "Dedication Ahmanson Law Center," 1975 Creighton Law Review 236, 241 (1975). His "preferred solution" to this problem "would be to reverse the movement toward ever more regulation," that gives rise to court battles. Id., at 240.

Absent regulatory rollback, Judge Bork would remove broad categories of environmental and consumer protection disputes from the Federal courts and consign them to an administrative tribunal: "the categories of cases I have in mind might include those arising under the Social Securities laws, the National

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[1] "The Judicial Record of Judge Robert H. Bork," a report issued by the Public Citizen Litigation Group, August 1987. (Hereinafter "Pub. Cit. Rep.") On September 12, 1987 the U.S. Department of Justice released "A Response to the Critics of Judge Robert H. Bork," a report highly critical of the Public Citizen and other reports. Our study of both reports leads us to conclude that the 14 cases discussed in the Public Citizen report are the most appropriate body of cases by which to evaluate Judge Bork's views on access to the courts on "public interest" issues.

[2] Pub. Cit. Rep. at 81.

Environmental Policy Act, the Clean Air Act, the Water Pollution Control Act, the Consumer Products Safety Act, the Truth in Lending Act, the Federal Employers' Liability Act, and the Food Stamp Act. Other examples can be found." Bork, in The Pound Conference:Perspectives on Justice in the Future (Levin & Wheeler, eds. 1979) 156.

Access cases fall into several categories, the most important of which is standing. The breadth or narrowness of the standing test can determine whether a membership organization, which typically sues on behalf of its members who are harmed by a government action or inaction, will have its case heard.

Judge Bork's consistent record of votes against access in 14 split decisions permits a reasonable inference that he is prepared to attack congestion resulting from cases he regards as legally trivial by formulating restrictive access rules that keep such cases out of the courts.

In his seminal opinion on standing in Barnes v. Kline, 759 F. 2d 21, 71 (D.C.Cir. 1985), Judge Bork repeated his conviction that "public interest" suits should not be in federal courts:

> "[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens."

Judge Bork's record demonstrates a general tendency to formulate narrow standing rules. He has been willing to reach far beyond the holdings of Supreme Court standing decisions to find new restrictions on standing. A noteworthy example of this

practice is Haitian Refugee Center v. Gracey, 809 F. 2d 794 (D.C. Cir. 1987), where Judge Bork, claiming that the Supreme Court was "in the process of reworking the concept of standing," asserted sweeping additional requirements for establishing causation (an element of the standing test). Id. at 798. Even Judge Bork's colleague, Judge Buckley, who agreed the case should not be heard, felt Judge Bork's new restrictions on standing were not supported by case law. Id. at 816.

While most charges that Judge Bork is a judicial activist have concerned his views on civil rights and civil liberties, the Haitian Refugee case suggests an "activist" approach on the threshold issue of whether "public interest" groups may even have their cases heard by a court.

Judge Bork has not directly criticized Supreme Court decisions establishing a right to sue for noneconomic environmental harm. However, when the government challenges the standing of membership organizations like NRDC, it typically does not claim there is no right to sue for environmental harm. Rather, the government has argued that the alleged harm to our members' interests is too "speculative" or not sufficiently connected to the alleged illegal government action we seek to challenge. While Judge Bork has not yet written an opinion directly confronting this argument in an environmental case, his opinions in related cases suggest strong sympathies with the government's position. Thus, in a concurring statement in Center for Auto Safety v. Thomas, 806 F. 2d 1071 (D.C. Cir. 1986),

vacated and rehearing en banc granted, 810 F. 2d 302 (1987), he indicated his disagreement with the majority's conclusion that the Center had standing to challenge the government's relaxation of auto fuel economy standards. Judge Bork concurred in the result only because he believed a prior decision of the D.C. Circuit bound the panel.[3] He cited with apparent approval a dissent opposing standing for the Center by Judge (now Justice) Scalia in the earlier case. 806 F. 2d at 1080.[4]

Similarly, Judge Bork rejected standing for Northwest Airlines in a suit by the company challenging an FAA decision to recertify a former Northwest pilot who had been fired for flying while intoxicated. Judge Bork found an allegation by Northwest that this pilot might pose a safety threat to its planes and passengers to be insufficient for standing, characterizing the possibility that the pilot would fly in areas where Northwest operates and cause injury to Northwest's passengers or crew as "remote and speculative." Northwest Airlines, Inc. v. FAA, 795 F. 2d 195, 201 (1986).

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[3] To state the obvious, if elevated to the Supreme Court, Judge Bork would be given the opportunity to overturn the D.C. Circuit precedent that constrained him in the CAS v. Thomas case. A decision of the Supreme Court adopting a stricter standing test on constitutional grounds would require a constitutional amendment to correct.

[4] Judge Bork joined in an opinion granting NRDC's challenge to the Department of Energy's failure to issue appliance efficiency standards. NRDC v. Herrington, 768 F. 2d 1355 (D.C. Cir. 1985). The issue of NRDC's standing was not raised in that case. Had it been, Judge Bork's statement in Center for Auto Safety suggests he would have argued that NRDC lacked standing.

Finally, Judge Bork has raised a question whether membership groups should have standing to challenge harm done to their members when the degree of harm suffered differs from member to member (a fact that is often true regarding harm caused by exposure to environmental contaminants). Telecommunication Research and Action Center v. Allnet Communication Services, 806 F. 2d 1093, 1097 n. 1 (D.C. Cir. 1986).*

On a related access question, in Bellotti v. NRC, 725 F. 2d 1380 (D.C. Cir. 1983), Judge Bork (joined by Judge MacKinnon) upheld an NRC decision to define a "proceeding" regarding a nuclear power plant so narrowly that only the power plant owners had a right to participate. The NRC had ordered the utility to develop a plan to remedy a safety problem at the Pilgrim Station in Massachusetts. The Attorney General of Massachusetts, contending that the company's remedial plan was inadequate, sought to intervene in the NRC proceeding. The NRC maintained that the "proceeding" was restricted to its decision to order the development of a plan and did not extend to the contents of the plan. Accordingly, Judge Bork reasoned, the Attorney General could intervene "only if he opposed issuance of the Order [to prepare a plan], which he does not." Id. at 1382.

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* This case was a suit for damages. Judge Bork's comment in the case notes that there is no apparent rationale for recognizing a distinction between damage suits and injunctive or declaratory relief suits. However, he concedes that the Supreme Court has stated that there is a distinction. 806 F. 2d at 1097 n.1. His pointed notation of the absence of a rationale for the Supreme Court's conclusion suggests he disagrees with that conclusion.

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The Bellotti case is significant because it gives license to regulatory agencies to tailor their definitions of proceedings so that only the regulated industry can participate.

In sum, Judge Bork's views on standing and other access issues uniformly would result in denial of access to parties seeking to assert noneconomic rights. When combined with his nonjudicial statements characterizing environmental and other "social welfare" suits as legally trivial, his record provides a strong basis for assuming that if placed on the Supreme Court he would actively explore opportunities for further narrowing access to the courts by groups like NRDC.

B. Deference to Government Agencies

If NRDC succeeds in getting into court in suits against the government, we must overcome the presumption that the government has acted lawfully. The Supreme Court has instructed judges to defer to government agency determinations in close cases but it is expected that such deference will be exercised in a balanced, principled manner.

A report issued by the Public Citizen Litigation Group examines 28 split decision cases where government actions in regulatory, labor or freedom of information disputes were challenged. Out of twenty such cases brought by nonbusiness groups ("public interest" groups or labor groups) Judge Bork

voted to uphold the government on eighteen occasions. Pub. Cit. Rep. at 13-50.

However, his votes in the eight cases brought by business against the government indicate that Judge Bork does not have a consistent standard for deference. In all of the eight cases brought by businesses he voted to overturn the government action.

We should be careful not to draw firm conclusions from a mere numerical comparison such as that outlined above. However, after careful reading of the Public Citizen report's discussion, the Department of Justice's rebuttal of that report, and an examination of the opinions discussed, we cannot conclude that this record is simply a statistical fluke. Not all of Judge Bork's opinions in these cases are egregious examples of straining for a result. However, neither are they obviously the only correct result. In each of these cases at least one judge disagreed, often vehemently, with Judge Bork's view. See, e.g., Pub. Cit. Rep. at 19-20, 22, 24, 27, 30-31, 33, 41-42. Thus, there is an apparent pattern of onesidedness in the results advocated by Judge Bork and this pattern is not explained away by the specifics of the cases themselves.

CONCLUSION

We have examined Judge Bork's views on the desirability of removing environmental (and other "public interest") cases from the federal courts and his record of votes in split decisions on access and deference. We conclude that his elevation to the

Supreme Court could lead to a major impairment of membership organizations' ability to monitor and enforce environmental and other remedial laws. We believe that a significant narrowing of access to the courts would contribute to a large and undesirable shift of power from the legislative branch to the executive branch and regulated industries in the important areas of environmental law and other programs where action by our government is needed to protect health and natural resources and otherwise promote the general well-being.

Judge Bork has asserted that the legislature -- not the courts -- should make the law. But if the courts are not then available to enforce remedial statutes, illegality is invited and the public's respect for law and government is diminished.

New York State Defenders Association, Inc.
Public Defense Backup Center
150 State Street • Albany, New York 12207 • (518) 465-3524

September 16, 1987

The Honorable Joseph R. Biden
Chairman, Committee on the Judiciary
489 Senate Russell Office Building
Washington, D.C. 20510

Dear Senator Biden:

On behalf of the Board of Directors of the New York State Defenders Association, I write to oppose the nomination of the Honorable Robert H. Bork to the United States Supreme Court. Our Association believes that the principles of equal access to the justice system embodied in the United States Constitution and the rights of our clients compel this position.

Our Association represents the interests of more than 5000 public defense attorneys in the state of New York, 1300 of whom constitute members of our not-for-profit corporation. We administer the nation's only Public Defense Backup Center and monitor the development of constitutional and criminal law. Our opposition to Judge Bork's confirmation rests upon a comprehensive review of the record of Judge Bork's opinions and writings which indicate minimal appreciation for and deference to the principles upon which the survival of the rights of our clients depends.

In Judge Bork's view, the Fourteenth Amendment's equal protection clause is limited to but two legitimate meanings: procedural equality and the interdiction of governmental discrimination along racial lines. The rights of the accused, indeed the right to counsel for which our Association functions, cannot be pursued by narrowly tailored idiosyncratic visions of the constitutional dimensions of these important questions.

While we do not dispute the quality of Judge Bork's professional experience nor the capacity of his intellect, we are concerned that if he sits on the United States Supreme Court, that institution will find it ever more difficult to oppose fundamental injustice. This is a time for the United States Supreme Court to rediscover the message of our founding fathers, not to obscure it. Judge Bork threatens the inalienable rights protected by the constitutional tradition we revere.

We urge the Committee to reject his appointment to the United States Supreme Court.

Very truly yours,

Wilfred R. O'Connor

Wilfred R. O'Connor
President

WROC/bb

ROBERT L. NOLAN, M.D.
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September 21, 1987

Senator Joseph R. Biden, Jr., Chairman
Judiciary Committee
U. S. Senate
Washington, D.C. 20510

Re: Judge Bork and Griswold v. Conn.

Dear Chairman Biden:

While I was a medical student at Yale (MD'53) there was no clinical training included for either medical students or resident physicians in the prescribing of contraceptives. The Connecticut statute that was found unconstitutional in the 1965 Griswold decision was responsible for this omission, since it was then unlawful to prescribe contraceptives for women who came to the New Haven Hospital clinics where this training was provided.

This meant that there were many situations in which women for whom pregnancy itself constituted a serious health risk, could not be given the benefits of known medical contraceptive technology in New Haven. Those who could afford to do so would have to go to New York for this purpose.

Judge Bork's comments at the hearing did not take into account such effects of that law. I was troubled by his continued criticism of the Griswold decision, and could not find in his hearing statements any actual assurance that he would apply the doctrine of stare decisis to this and some other cases that he has severely criticized, even campaigned against.

While Judge Bork's scholarly ability and command of case law deserves respect, his application of narrow construction and original intent theories are at odds with the genius of the Constitution and the changing needs of our society.

I urge the Senate to advise the President to select another nominee for the Supreme Court whose erudition and understanding are more likely to be used to preserve and advance human rights as new situations arise in the future.

Sincerely,

Robert L Nolan

Robert L. Nolan, M.D., J.D.

Tel. (415) 284-4277

(Prepared testimony of THE PATRIOTIC MAJORITY
for the Senate Judiciary Committee)

THE CASE OF BORK VERSUS THE AMERICAN REVOLUTION

Two hundred years ago, during the deliberations of the Constitutional Convention, Dr. Benjamin Rush, signer of the Declaration of Independence, Surgeon General of the Continental Army, founder and first president of the American Society for the Abolition of Slavery declared:

"There is nothing more common than to confound the terms of the American Revolution with those of the late American War of Independence. The American War of Independence is over, but this is far from being the case with the American Revolution. On the contrary, nothing but the first act of the great drama is closed."

Rush was voicing the concerns of that grouping of the most fervent democrats and patriots that included besides himself, Jefferson, Paine, Sam Adams, and Franklin. They saw the American Revolution as an ongoing, never-ending process of struggle for greater democratic rights for more and more people. Rush and Paine in 1776 had collaborated with Jefferson on an early draft of the Declaration which would have abolished slavery. When the Constitution was adopted, they were concerned that it failed to reflect adequately the democratic and libertarian spirit of the Declaration; they were especially disturbed by the acceptance of the slave system in the Constitution.

Theirs was a grand vision of the Revolution as a Living Spirit; a

Spirit embodied in and forever moving and inspiring successive generations of patriots in struggle for ever-expanding democracy that would make greater liberty and justice accessible to more and more people of America.

It has been that vision of America and its Revolution that has been the source of hope and inspiration for the oppressed and exploited of the world for more than two centuries.

The Bork nomination should pit neither Republican against Democrat, nor liberal against conservative, nor right against left. All of us are Americans, whether by birth or by choice, and therefore presumed to be equally bound and committed to that historic political compact embodied in the Declaration of Independence and the Constitution with its Bill of Rights.

The American people have every reason to be alarmed at the prospect of Judge Bork's accession to the Supreme Court. His alleged "balanced" view of the Constitution is nothing more than the anti-democratic and immoral notion that for every right granted to a group or class of Americans, another right is denied some other group or class. Thus, the right of black Americans to access restaurants and hotels denies proprietors of the "right"(!) to discriminate against them; the right of pregnant women to safe and healthful work environment denies employers the "right" to dangerous conditions in the workplace.

The legal history of Robert Bork already revealed to the Senate Judiciary is loaded with examples of this kind of Bork "logic". But despite every effort to "change his spots" , it is clear that the real

Bork views the Bill of Rights, and most particularly the First and Ninth Amendments, (the very heart of the Spirit of the American Revolution) with a jaundiced eye more befitting a Tory of 1776 than a Justice sworn to uphold the Constitution with its Bill of Rights. Bork's record plainly demonstrates that he lacks the compassion, the commitment to liberty and social justice and to the democratic ideals of the patriot founders of our nation.

The Senate shoulders a solemn responsibility in this matter. At stake is the future of democracy in our country; the future of the American Revolution, the most liberatory, most enlightened and most universally admired, imitated and "exported" Revolution in history.

A rejection of this nomination would show the American people that their elected representatives in the Senate are firm in their patriotic commitment to defending the Living Spirit of the American Revolution.

It would send a signal to the oppressed and exploited of the world that that Spirit is alive and well, at least in the Senate of the United States, and that "government of, by and for the people" has not perished from this earth.

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August 17, 1987

Hon. Joseph R. Biden, Jr.
Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Robert Bork

Dear Senator Biden:

This is to express my concern about the nomination of Robert Bork to the Supreme Court. I fear he would eviscerate much of the useful substance of the antitrust laws. With less direct experience to guide me, I also fear that he would in the guise of strict construction of the Constitution actively limit the expression of legitimate citizen interests, bolster privilege, and constrict social mobility.

First I should make you aware of my background and experience with the nominee. In the 1960's I served in the Antitrust Division of the Department of Justice, in a section concerned with transportation and other regulated industries. In the 1970's and 1980s in private practice I have actively worked for "deregulation" -- decartelization -- of the transport sector.

I have had one antitrust case before Judge Bork, recently, the case of Rothery Storage & Van Co. et al. v. Atlas Van Lines, Inc. (792 F. 2d 210 (D.C. Cir. 1986). In this case Judge Bork wrote the opinion dismissing the appeals we brought, and ruled against propositions of law which we advanced. Judge Bork also in a footnote wrote that in our brief's argument I sought to extend too far the content of one of the material undisputed facts. I disagreed as to this comment -- would stake my license to practice law on the accuracy of the statement which Judge Bork questioned. I disagreed with the reasoning Judge Bork used in disposing of the case. Whether my comments in this letter evidence mere personal pique or broader concerns is for the reader to judge.

In preparing for pleadings before Judge Bork, I expanded my acquaintance with some of his principal publications. In my opinion he is correct in seeking to integrate the insights of modern economics into the interpretation of the antitrust laws.

I also agree with the proposition that we should encourage competition in the economy in large measure to improve consumer welfare, if not entirely for that reason. These tenets of Judge Bork are not the source of my concern with his appointment to the Supreme Court.

In the Rothery case Judge Bork demonstrated the source of my concern about his approach to the antitrust laws -- doctrinaire attachment to a limited set of tenets which seem likely excessively to curtail the scope of such laws. Basing his opinion almost entirely on a market share measure for the defendant firm, he ignored evidence of record indicating that a group of major van lines which collectively had over 60% of the national household goods moving market were acting in parallel fashion to impose restraints on local moving firms who were potential rivals. He also ignored record evidence that the executives of one, the defendant, intended to limit competition. When I sought to bring the parallelism of action to his attention in oral argument, he dismissed it with the observation that "we have no theory" to determine the cohesiveness and results of such parallelism of action.

In finding justification for market restraints for the purpose of ending "free riding", Judge Bork cited benefits to local houshold goods moving firms from being associated with national van lines, without considering countervailing benefits to such van lines from affiliation with well regarded local movers.

In his legal analysis, Judge Bork argued that courts are not to judge "degrees of reasonable necessity" for restraints which arguably facilitate trade but also limit competition. This approach in substance rejects an established tenet of antitrust laws -- the "least restrictive alternative" doctrine, to the effect that where there is more than one way to reach legitimate commercial goals, and some alternatives would restrain trade more than others, use of feasible less restrictive alternatives is required. He also dispensed with antitrust precedent to the effect that where practices present procompetitive and anticompetitive effects, the two are to be weighed for net effect.

Chief Judge Wald, on the same panel with Judge Bork, expressed concern with sole reliance on one market share measurement to determine market effects, with a mode of analysis omitting consideration of whether less restrictive alternatives were

available, and with Judge Bork's creation of a "new per se rule of legality", lacking support in Supreme Court precedent, for restraints arguably involving small market shares.

In the process of reaching his result Judge Bork displayed a technique which echoes what I hear about his analytic technique in other areas -- he chose a 19th century case as a foundation of his analysis and reinterpreted a series of later cases, including Supreme Court cases, to bring them in accord with his view of the holding of the ancient precedent.

I was left with the impression -- the conviction -- that Judge Bork siezed upon the Rothery case to imprint into antitrust law the premises and mode of analysis he had been advocating for decades heretofore. Other attorneys who have reviewed the matter have expressed the same view.

I am concerned about elevating this man to the Supreme Court because I think his theoretical underpinnings are too limited. He seems unable to accept any wisdom in antitrust precedent which takes into account features of the economic world which do not fit into his own theses. And he seems quick to shuffle out of sight inconvenient facts, however explicitly put on the record before him. He reminds me of the "scientists" who for years said curve ball pitches didn't curve. You will remember the ideas of the time -- "scientists" had no theory to explain curve balls, and we were told not to believe our eyes. All the while major league pitchers refined their curve balls and sliders, and successful batters believed their eyes.

In the antitrust area, Judge Bork seems to me to fit the description of "ideologue" -- if that means a person whose passionate attachment to certain views seems to blind him to inconsistent facts and theories.

Judge Bork's method of legitimizing his views is also of concern. In seeking legitimacy in antiquity, he would make himself appear conservative. But this disguises an active attempt to impress his own current concepts on a body of law which has undergone a generally sensible evolution up to the point of his surgery.

I am aware of Circuit Court judges who have an appreciation of the importance of economic analysis, but are more tempered and reasoned in their use of it. Among them are Judges Posner and Breyer. These men are not obviously the intellectual inferiors of Judge Bork. Such jurists are, in my opinion, likely to be

more judicious in the use of economic concepts, with more appreciation of the current limits of those concepts and more appreciation of the utility of some judicial precedents which Judge Bork would dispense with.

In my opinion some constructions of the antitrust laws promote economic mobility and economic diversity in a way which also promotes economic efficiency. Conversely, a too-narrow view of the antitrust laws could, I fear, tend to enhance the positions of persons and firms now in leading or dominant economic positions, in a way detrimental to economic and social diversity, economic and social mobility, and eventually economic efficiency.

The flip characterization of Judge Bork among some antitrust law practitioners is that he never saw a restraint he didn't like. This is presumably an overstatement. But it reflects a deeply rooted concern that his tendencies would erode the useful substance of laws which we have conceived to be a bulwark of economic and social liberties. I may not share all the views of all the opponents of Judge Bork's appointment, but I do share that concern.

I have no specialized knowledge in the civil rights area. But the objections I hear to Judge Bork among those concerned with civil rights are disquietingly similar to my concerns about his handling of the antitrust laws. He is charged with cloaking an active attempt to limit civil liberties under an appeal to original constitutional intent. Without reviewing Judge Bork's decisions in the civil rights area, I can't offer you either experience based or analytic conclusions concerning such charges. But what I have seen in the antitrust area makes me profoundly uneasy about this man's inclinations. I would much prefer to trust Supreme Court responsibility to someone who did not generate such concerns.

This brief letter on one aspect of Judge Bork's activity is surely not enough, of itself, to support your eventual judgment on this nomination. I hope it adds something of value to your deliberations.

Sincerely,

Jack Pearce

Jack Pearce

JP:dwh

PEARCE AND ASSOCIATES

RECOMMENDATION
THAT JUDGE ROBERT BORK
NOT BE CONFIRMED
AS AN ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT
ON THE BASIS OF
DEFICIENCIES IN HIS APPROACH TO
INTERPRETATION OF THE ANTITRUST LAWS

After hearing much of the arguments for and against Judge Borkl's confirmation as a Supreme Court Justice, I am led to raise my initial impression of concern, set out in a prior letter addressed to all members of the Judiciary Committee, attached, to a recommendation against confirmation.

Eminent antitrust practitioners, including Donald Baker and Thomas Kauper, whom I respect from personal knowledge of their capacities and histories, sponsor Judge Bork. I agree with them and with Judge Bork that consumer welfare should be the principal goal of antitrust laws. And like these supporters, I believe Judge Bork has stated powerful general theses which should cause careful reexamination of many antitrust precedents.

But Judge Bork's supporters are inaccurate when they suggest that Judge Bork is not on or beyond the edge of the mainstream of current antitrust thinking. The contrary is easily shown.

In Chapter 10 of his 1978 book "The Antitrust Paradox", Judge Bork caps a line of argumentation directed at a narrow reading of limitations on merger controls with the suggestion that any set of horizontal mergers which would allow three firms to control all or virtually all of a market should be "presumptively lawful." Current merger guidelines issued by the Antitrust Division are not phrased in the broad terms used by Judge Bork, but can be compared by noting that Justice indicates it would challenge a merger if four firms held about 70% of a market and a firm with 30% sought to acquire another firm with one or two percent.

In Chapter 11 of "The Antitrust Paradox", Judge Bork argues that "vertical" mergers (linking firms in one market to firms to which they sell) cannot increase market power in either market, and should be allowed unless they would bring about unacceptable "horizontal" market concentration at one of the two market levels -- that is, it would appear, three-firm market dominance. The current Department of Justice guidelines as to vertical integration set out several considerations which Judge Bork did not address, and promise scrutiny as to whether a "vertical" merger would create barriers to entry at either level or facilitate collusion in either level.

These and other features of Judge Bork's "Antitrust Paradox" publication indicate that he would considerably reduce the range

of application of the antitrust laws.

If Judge Bork's prescriptions would seem likely to lead to a more productive economy, we should welcome his departure from antitrust orthodoxy. But there are substantial indications that his views would lead to a less competitive and less productive economy.

A critique of Judge Bork's dissertation would take too much space for current purposes. He used a book to set out several chains of logic linking numerous assumptions. But visible economic experience casts doubt on some of his principal conclusions.

Judge Bork concluded his 1978 argument on acceptability of 2-3 firm oligopoly levels by citing the U.S. automobile industry as demonstrating full competitiveness with only three firms. While the U.S. oligopoly did show significant competition, most adults who can count four wheels have recognized that in the 1980's, non-U.S. automakers have filled out numerous competitive dimensions not probed by our domestic big three.

A fundamental element of Judge Bork's arguments on vertical integration is the proposition that market power at one level cannot, except in rare situations, be increased by organizing a subsequent economic level by merger or limiting competition among subsequent-level vendors. Experience in the recently-deregulated trucking industry suggests otherwise.

Between 1945 and in 1980, when the trucking industry was decartelized pursuant to the Motor Carrier Act of 1980, Teamster wage rates rose far greater than wages for comparable skills in the general economy, reaching levels indicating an exercise of considerable market power.

Some economic observers suggested that cartelization at the carrier level facilitated labor cost increases, by diminishing carrier incentive to resist labor cost increases. That is, it appeared that lack of competitive pressure among carriers reduced incentives to bargain hard on labor costs, and labor cost increases were easily passed along to consumers. This was also the view of many industry participants.

After the 1980 Motor Carrier Act, collective pricing among carriers was curtailed, the Interstate Commerce Commission stopped propping up prices in its administration of "tariff" controls, and many new carriers entered the trade. Carrier prices stopped rising, Teamster wage increases trailed off, and non-Teamster labor took many jobs formerly held by Teamsters. The increase in competition at the carrier level greatly reduced the market power available to the Teamsters at the labor level. All this has been extensively documented.

One might argue for some time about how and the extent to which Judge Bork's theories should be modified to take account of the recent economic experience noted briefly above. But when observable facts and a proferred theory do not square, a re-

examination of one or both is required. The facts are open for all to see. Pending careful analysis, they suggest to me serious shortcomings in Judge Bork's theories.

The extent to which Judge Bork would currently apply his 1978 theses on the antitrust laws is illustrated by the 1986 case of Rothery Storage & Van Co. et al. v. Atlas Van Lines, 792 F.2d 210 (D.C. Cir. 1986), in which I participated as counsel for the plaintiff firms.

We presented a fact situation in which a group of five leading van lines held over 60% of the long-haul consumer household goods transportation market. Those firms initiated similar restraints on the potentially competitive operations of smaller household goods firms. These smaller firms also had "agency" contracts which fed business to the major van lines, and these contracts were used to impose the restraints. We furnished record evidence that the directors of the defendant van line specifically intended to diminish competition from smaller "carrier agent" firms. And we pointed out that the defendant van line and others had available a variety of less restrictive means of achieving any legitimate trade mark protection or brand name protection objectives.

Judge Bork ignored the evidence on parallel actions among leading van line firms, and ignored the evidence of specific intent to suppress competition. By taking no account of these

data, he was able to write an opinion which pivoted decision on the question whether a single firm with an (understated) 6% market share could have expected to restrain competition by means of the contractual restraints involved. Springboarding from this fact characterization, he developed a sweeping thesis to the effect that horizontal restraints by small-share firms arguably related to their contractual means of dealing with other firms must be presumed to be efficiency motivated, there should be no examination of whether less restrictive alternatives were available, and there should be no examination of whether anticompetitive effects of the restraint outweighed precompetitive benefits. In the course of his thesis, Judge Bork reviewed, construed, and in my opinion revised a considerable body of Supreme Court precedent.1/ Judge Bork's opinion in the Rothery case was a straight-line development of the views stated in "The Antitrust Paradox."

The confirmation hearings have revealed that in constitutional interpretation as well as in the antitrust area

1/ In the Rothery case, Judge Bork based his reasoning on an 898 case called Addystone Pipe & Steel Co. v. U.S., 85 Fed. 271, which on page 26 of his "Antitrust Paradox" book he called "one the greatest, if not the greatest, antitrust opinions..." ting that Judge Taft, then a lower court judge, appealed to the mmon law to find the examined agreements unlawful, Judge Bork miringly observed that Judge Taft "... chose his common law ses carefully, however, and imposed upon them his own ideas." ntitrust Paradox, p. 27). Judge Bork engaged in the same sort selective reconstruction of Supreme Court antitrust precedent crafting his opinion in the Rothery case.

Judge Bork has held views widely departing from the judicial mainstream. There seems a possible further parallel. Judge Bork's approaches to constitutional interpretation point toward limited recognition of personal liberties. Judge Bork's antitrust views would seem on first appraisal to favor greater scope for private decisionmaking. But they allow for wide scope for collective restraints on competitive impulses; with the possible result of foreclosing many sources of innovation in the economy.

Some Senators seems to be weighing the question whether Judge Bork would be bound by precedent inconsistent with his theses, or would actively reshape or repeal such precedent. I submit that the Rothery case points up the obvious; where opportunity arises, this judge will seek to write his own views into law.

The Rothery case also illustrates another relevant factor: the judicial decision writer has considerable latitude in characterizing the facts of the case before the court, choosing the basis for decision, and formulating the rules used to resolve the issues chosen for decision. Judge Bork is apparently adept at exercising all these perogatives.

I submit that new law is often made when no clear track is yet laid, at the margins and in the gaps. The federal judiciary systematically funnels to the High Court such indeterminate questions, when of high importance. Senators must expect that over a lifetime, Judge Bork, like any appointee, will have many

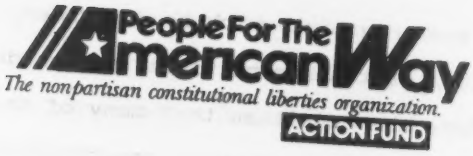
opportunities to address critical questions as to which fork the law should next take. Can Senators expect more or less of Judge Bork, or any appointee, than that the appointee will exercise his or her views when the case permits?

In these confirmation hearings, Judge Bork presented himself as willing to entertain new economic theory, and presumably additional information on economic experience. However, on the Bench, in Rothery, Judge Bork exhibited bold certainty, and ambitious application of his premises. I must believe that what we saw in Rothery is what we would see in the High Court.

On the record of his 1978 book and his 1986 opinion in the Rothery case, I conclude that Judge Bork has stated as dogma bold theses which are powerful, but overstated and underqualified, and thus far not fully supported by visible economic experience. If he is incorrect, applying his ideas would lead to a much less competitive, much narrower society. His ideas deserve careful attention; but not as yet unqualified application. I could not support giving him license to revise the antitrust laws in the judicially unreviewable position of a Supreme Court justice.

We need on the Supreme Court one or more Justices having sophisticated understanding of economic processes, including economic regulation. I hope there is room on the Supreme Court for bold, challenging intellects. But in my opinion we also need the Supreme Court Justices to be less rigid and limited in

concepts than Judge Bork. Let us find our way to better antitrust policies, so important to a competitive economy, by appointment of capable individuals less tendentious as to theory, more respectful of fact, and more hospitable to emergent economic potentials.



STATEMENT OF JOHN H. BUCHANAN
CHAIRMAN, PEOPLE FOR THE AMERICAN WAY ACTION FUND
OCTOBER, 1987.

Mr. Chairman, thank you for the opportunity to express my views on the nomination of Judge Robert H. Bork to the Supreme Court. I am Chairman of People For the American Way's Action Fund. Our membership - 270,000 citizens nationwide - mirrors the diversity of this nation. We are young and old, liberal and conservative, Democrat and Republican. What unites us is our commitment to defend our Constitution and the rights and liberties it guarantees to all of us.

Our testimony is in opposition to Judge Bork's nomination to the Supreme Court. Judge Bork and his supporters maintain that he is a moderate in his judicial beliefs, but he is not. Judge Bork is far from the mainstream of traditional Supreme Court jurisprudence. His broad and often virulent criticism of long settled Constitutional doctrines over the last 25 years exceeds the bounds of scholarly dissent. There are at least 31 major lines of precedent with which Judge Bork has disagreed. I have attached for inclusion in the record "Judge Bork's Views Regarding Supreme Court Precedent," an analysis of Bork's views of these precedents, prepared by our organization and the NAACP Legal Defense and Educational Fund, Inc.

There has been much discussion during the Senate Judiciary Committee hearings on the question of whether Judge Bork would

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indeed overrule precedents with which he disagrees. Confronted with his own previous statements criticizing precedents, Judge Bork testified before the committee that many of these precedents, which safeguard fundamental constitutional rights, would be safe even though he remains in disagreement with their underlying reasoning.

We are not reassured. In the areas of free speech, privacy, equal protection of the laws, and congressional standing, to name but a few, Judge Bork may or may not try to overrule past decisions, but we can nevertheless be certain that future cases relying on the same principles will be judged according to his grudging view of constitutional protections.

In a 25-year career articulating his interpretation of the Constitution, Judge Bork has formulated a pinched, restricted role for the courts. In a nation governed by his Constitution, the truly remarkable social change we have witnessed since World War II which has furthered equal justice under law, would not have occurred.

Under Judge Bork's Constitution, there would be no life to the concept of equal protection of the laws, nor to the measures enacted to ensure an end to government endorsed, or enforced, racial discrimination. In Judge Bork's Constitution, there is no room for women. Under Judge Bork's Constitution, there would be regulation or outright suppression of whole categories of speech now protected by Supreme Court decisions. Under Judge Bork's Constitution, the most personal and cherished family

relationships would be vulnerable to intrusion by the State.

We believe that whether Robert Bork's nomination to the Supreme Court is accepted or rejected by the Senate, these confirmation hearings will go down in constitutional history. Judge Bork testified before this Committee for an unprecedented 30 hours and responded to an exploration of his judicial views more extensive than any past examination of judicial nominees. These hearings provided an extraordinary national seminar on the Constitution and the role of the Supreme Court, which coincided with the celebration of the bicentennial of the Constitution.

We applaud the Committee for the great care with which you have considered Judge Bork's nomination. Our nation's courts have a long-held tradition of protecting individual liberties. In the words of former Congresswoman Barbara Jordan, "The Supreme Court is the last bulwark of protection for our freedoms." The Committee appropriately examined Judge Bork's judicial philosophy in that light. Over the last twenty years, Judge Bork has developed and articulated a comprehensive judicial philosophy, which is expected to provide the framework for his judicial decision-making. This judicial philosophy would have the courts abdicate their responsibility for protecting constitutionally guaranteed individual liberties from the will of any temporary majority. It constitutes the primary reason Judge Bork was selected by this Administration to succeed Associate Justice Lewis Powell, a conservative jurist who recognized the role of the courts in truly providing for "equal justice under the law."

Coming at the end of these hearings, my remarks will focus specifically on Judge Bork's testimony before this Committee. We believe Judge Bork's testimony raises additional concerns about his suitability for our nation's highest court.

Perhaps the most noteworthy aspects of Judge Bork's testimony were the apparent shifts he made in discussing equal protection for the rights of women under the Fourteenth Amendment, freedom of speech, and the role of prior Supreme Court rulings in reaching future decisions on constitutional issues. These shifts raised questions about a "confirmation conversion."

Judge Bork's Confirmation Day Assurances Notwithstanding, His Views on Precedent Present Serious Risks to Established Law.

For over twenty years, Judge Bork has repeatedly attacked many landmark constitutional decisions of the Supreme Court, particularly those that protect individual rights and liberties. On eleven occasions since 1981, Judge Bork has denounced in sweeping terms the Supreme Court's interpretation of the Constitution over the past thirty years. He has also called for overruling Supreme Court constitutional decisions not based on what he perceives as the correct interpretation of the "original intent" of the Constitution's framers:

> Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from

nothing the framers intended.[1]

Prior decisions, in Bork's view, should not prevent the Court from interpreting the Constitution anew in what it perceives to be the more correct manner:

> Supreme Court justice[s] always can say...their first obligation is to the Constitution, not to what their colleagues said 10 years before.[2]

Respect for prior decisions of the Court is central to our constitutional system. Both "conservative" and "liberal" Supreme Courts throughout our history have adhered to the principle of "stare decisis," and while adapting the Constitution to changing times, have respected precedent. The question of whether Judge Bork will respect established law was raised repeatedly in the hearings:

> Senator Biden: Judge Bork, I am sure you know the one question to be raised in these hearings is whether or not you are going to vote to overturn Supreme Court decisions, which is obviously your right as a Supreme Court Justice, if you are confirmed.
>
> In 1981 in testimony before the Congress, you said, "there are dozens of cases" where the Supreme Court made a wrong decision. This January, in remarks at the Federalist Society, you implied that you would have no problem in overruling decisions based on a philosophy or a rationale that you rejected.
>
> In an interview with the District Lawyer magazine in 1985, you were asked if you could identify cases that you think should be reconsidered. You said, and I again quote, "Yes, I can but I won't."

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1 Transcript, Speech to the Federalist Society, January 31, 1987, p.126 (emphasis added).

2 "Justice Robert H. Bork: Judicial Restraint Personified," California Lawyer, May 1985.

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> Would you be willing...to identify the dozens of cases that you think should be reconsidered?
>
> Judge Bork: Mr. Chairman, to do that I am afraid I would have to go out and start back through the casebooks again to pick out the ones.
>
> I do not know how many should be reconsidered. I can discuss with you the grounds upon the way in which I would reconsider them.[3]

In his prepared opening statement, Judge Bork sought to assure the Judiciary Committee that he would respect precedent, obviously aware of the concerns generated by his longstanding attacks:

> ...It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought.[4]

In contrast to this view, the Committee learned on the fourth day of these hearings, that during a 1985 speech, Judge Bork had stated:

> I don't think that in the field of constitutional law, precedent is all that important....[I]f you become convinced that a prior Court has misread the Constitution, I think it's your duty to go back and correct it....I think the importance is what the Framers were driving at, and to go back to that.[5]

The newly discovered 1985 remarks highlight the contrast

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3 Transcript of Proceedings, United States Senate Committee on the Judiciary Hearing on the Nomination of Honorable Robert H. Bork to be Associate Justice of the Supreme Court of the United States, September 15, 1987, p.118. (Hereinafter Hearing Transcript).

4 Id. at 118.

5 Hearing Transcript, September 18, 1987, pp.100-101, airing of Canisius College tape.

between Judge Bork's long-standing practice of attacking the value of precedent and his confirmation day assurances that he would respect established law.

In his testimony, Judge Bork stated that he would not seek to overturn century old Commerce Clause precedents, the Legal Tender cases, or decisions protecting freedom of speech that he believes to be wrongly decided. At least one Senator questioned how Judge Bork could abide by precedent with which he disagreed. Senator Specter described the risk in accepting Judge Bork's assurances in light of the impossibility of predicting future cases that may arise:

> ...[T]here is a question of what risk is involved, risk to the Constitution and risk to the Court and that is a judgment which has to be made. When you and I talked extensively about Brandenburg v. Ohio and we traced the history of the Holmes opinion on clear and present danger and we went through...[other cases,]...you said that you accepted the principle of Brandenburg and you would apply it but you disagreed with the philosophy.
>
> ...[A] concern I have is that when the next set of facts come up...and they aren't going to be exactly like Brandenburg because no two cases are exactly alike on the facts...if you disagree with the philosophy, how will you decide the case...[6]

When he testified following Judge Bork, Harvard Professor ribe characterized the dilemma facing this Committee:

> What emerged was that Judge Bork disagrees with where the Court has been in this area, but says he's willing to accept it.
>
> We are left with a nearly total cloud. What does it mean to accept a doctrine that one says is

6 Hearing Transcript, September 19, 1987, p.73.

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fundamentally wrong?[7]

At the Confirmation Hearings, Judge Bork Said He had Changed his Prior View that Women and Other Non-Racial Groups Are Not Covered by the Fourteenth Amendment's Equal Protection Clause. But Constitutional Law Authorities Pointed Out that Bork had Left Himself a "Blank Check" in Deciding Such Cases.

Over the last 16 years, Judge Bork has claimed that the Equal Protection Clause of the Fourteenth Amendment prohibits governmental discrimination only "along racial lines." This view, which is contrary to existing Supreme Court precedent, precludes a court from applying the Equal Protection Clause of the Fourteenth Amendment to remedy sex discrimination.

For example, in 1971, Bork wrote:

> Cases of race discrimination aside, it is always a mistake for the court to try to construct substantive individual rights under the...equal protection clause.[8]

In a comment at Aspen Institute in August 1985, he said:

> I would think pretty much race, ethnicity (pause) is pretty much what the 14th Amendment is about; because if it's about more than that, it's about a judge making up what more it's about. And I don't think he should."[9]

As recently as three weeks prior to his nomination, he said:

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7 Hearing Transcript, September 22, 1987, p.18 (emphasis added).

8 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 11 (1971).

9 Comment, Aspen Institute, August 13, 1985 (emphasis added).

> I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity.[10]

In his testimony, however, Judge Bork, for the first time, said he now believes the Equal Protection Clause applies to women:

> Senator DeConcini: ...You have stated that you now believe that the Fourteenth Amendment, the Equal Protection Clause, applies to women. There is no question about that, is there, anymore?
>
> Judge Bork: None, it applies to everybody.
>
> Senator DeConcini: ....[I]s it still correct that in the interview that you did just less than three months ago, you stated in that interview -- and that is this one of [June] 10th, 1987 -- are you familiar with that....
>
> ...Judge, what bothers me about that....[y]ou stated there, "I do think the equal protection clause probably should have been kept to things like race and ethnicity."
>
> Judge Bork: Ethnicity, yes.
>
> Senator DeConcini: Yes. Is that your position?
>
> Judge Bork: No....[11]

Further, Judge Bork testified that he now adheres to a theory of equal protection which he calls the "reasonable basis test," and that his standard would lead to the same results reached by the Supreme Court in recent years in sex discrimination cases:

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10 Worldnet Interview, June 10, 1987, p.12 (emphasis added).

11 Hearing Transcript, September 17, 1987, pp.133-134 (emphasis added).

> The fact is a reasonable basis approach which rejects artificial distinctions and discriminations would arrive at all of the same results, I think, or virtually all of the same results that a majority of the Supreme Court has arrived at using a group approach and an intermediate level of scrutiny approach. There is really no difference in anything except the methodology....[12]

Nowhere previously, however, has he ever mentioned his support for the reasonable basis test. Professor Tribe noted this in his testimony:

> In speeches right up through this June, Judge Bork indicated that the equal protection clause should have been kept to things like race and ethnicity. That leaves out such vital matters as sex, poverty, illegitimacy and handicap.
>
> ....Judge Bork offered to close those enormous gaps when he said that as a Justice he would strike down all unreasonable legislative classifications.[13]

Professor Tribe testified that past applications of the reasonable basis test Judge Bork now espouses denied equality to blacks and women:

> ....In 1873, the Supreme Court saw nothing unreasonable, and it said so, about separating the races in public railway cars. In 1896, the Supreme Court saw nothing unreasonable about segregation. In 1924, the Court saw a reasonable classification in the decision of New York State to keep women from working in restaurants late at night. In 1961, all nine Justices thought it was reasonable to excuse all women from jury service unless they volunteered.
>
> Every law student learns that only the Supreme Court's development of much more closely structured forms of scrutiny of laws based on sex

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12 Hearing Transcript, September 17, 1987, p.28.

13 Hearing Transcript, September 22, 1987, p.15.

and race has led us predictably toward equality.[14]

He added that Judge Bork's application of the reasonable basis test may not result in adequately ensuring equality:

> If you want to know how Judge Bork is likely to use that notion of reasonableness -- which I think none of us can guess for sure -- I simply point out to you that this summer he said that the Supreme Court has trivialized the Constitution when it struck down a law setting a different drinking age for men and women. The decision striking down that law was joined by Justice Powell; it was joined by Justice Stevens; it was joined by Justice Stewart; and Judge Bork says that it trivialized the Constitution.
>
> It seems to me that the reasonable classification test is a request for a blank check.[15]

Prior to his Supreme Court nomination, Judge Bork had said it is not possible to adapt the Constitution to the contemporary view of women. In a 1982 speech he stated,

> There being no criteria available to the court, the identification of favored minorities will proceed according to <u>current fads in sentimentality</u>....This involves a denial of the majority's right to choose its own rationales...It is not explained why courts are entitled to tell the legislature their moral judgments are really prejudices and that their perceptions of social reality are skewed.[16]

In contrast, in these hearings he testified:

> [A]s the culture changes and as the position of women in society changes, those distinctions which seemed reasonable now seem <u>outmoded stereotypes</u> and they seem unreasonable and they get struck down. That is the way a reasonable basis test

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14 <u>Id</u>. at 16.

15 <u>Id</u>. at 17.

16 Speech, Catholic University, 1982, pp.19 (emphasis added).

should be applied.[17]

Judge Bork's shifting views about the appropriateness of constitutional protection for women are reminiscent of his earlier position on the public accommodations provisions of what became the 1964 Civil Rights Act. During his 1973 confirmation hearing to become Solicitor General, Judge Bork recanted his 1963 position that federal laws requiring desegregation of lunch counters and other public accommodations were "unsurpassed ugliness." Today, it is considered radical to view constitutional protection against sex discrimination as a "current fad in sentimentality." It appears that Judge Bork unveiled his reasonable basis approach for the first time here because it would be untenable to go before the Judiciary Committee and argue for the exclusion of women as a group from constitutional protection.

Although Judge Bork attempted to recant some of his most controversial views during these confirmation hearing, he continues to oppose many basic civil rights protections and privacy rights.

Judge Bork Continues to Oppose Landmark Supreme Court Decisions Protecting Civil Rights.

* Racially Restrictive Covenants

In his testimony, Judge Bork reiterated his view that the Supreme Court's 1948 unanimous decision in Shelley v. Kraemer, in

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17 Hearing Transcript, September 15, 1987, p.211 (emphasis added).

which the Court held that judicial enforcement of racially restrictive covenants violates the Fourteenth Amendment, is insupportable:

> Shelley against Kraemer was a case decided under the Fourteenth Amendment. The Fourteenth Amendment, as we all know, applies only when Government acts, when Government coerces and denies equal protection of the laws or due process.
>
> That was a...restrictive racial covenant case, and the Court held that when a state court enforced that contract, that was action by the Government; and, hence, the Fourteenth Amendment applied to private action.
>
> * * * *
>
> The difficulty with Shelley was not that it struck down a racial covenant, which I would be delighted to see happen, but that it adopted a principle which, if generally adopted, would turn almost all private action into action to be judged by the Constitution....
>
> In fact, Shelley v. Kraemer has never been applied again. It has had no generative force. It has not proved to be a precedent....And while I criticized the case at the time, it is not a case worth reconsidering.[18]

William T. Coleman, Jr., former Cabinet member in the Ford dministration and Chairman of the NAACP Legal Defense and ducational Fund, Inc., stated before this Committee what Judge ork's position on Shelley v. Kraemer represented for civil ights and addressed inaccuracies in Judge Bork's testimony:

> Judge Bork believes that judicial enforcement of private agreements, even where it involves an injunction against the voluntary actions of two people to enter into a contract to sell a house to a black person, does not involve discriminatory

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[18] Hearing Transcript, September 15, 1987, pp.125-127.

action.

> Judge Bork's conclusion fails to come to grips with the fact that, prior to Shelley and in the decades since then, the Supreme Court has recognized in a wide variety of contexts that "the action of state courts and judicial officers in their official capacities" is state action subject to the commands of the Constitution.[19]

Furthermore, contrary to Bork's claim that "Shelley was never applied again," Shelley was indeed applied five years later in Barrows v. Jackson, 346 U.S. 249 (1953), which held that it would violate the Fourteenth Amendment for a state court to award damages against a white seller who sold property to a black buyer in breach of a restrictive covenant. It was also applied in many lines of cases thereafter.

* Poll Taxes

Judge Bork has repeatedly criticized the Supreme Court's decision in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), which invalidated a state poll tax law. Judge Bork has written that the case was "wrongly decided" on equal protection grounds. During these hearings, Judge Bork continued to maintain that the poll tax was not discriminatory:

> Senator Kennedy: Let me go to the issue of poll taxes. The right to vote is the cornerstone of a free society. For decades poll taxes were used to keep poor Americans, often of racial minorities, from exercising the franchise. In Harper versus Virginia Board of Elections, which was decided in 1966, the Supreme Court struck down the poll tax....

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19 Written Testimony of William T. Coleman, Jr., p.30 (citing Shelley, 334 U.S. at 14).

> In its majority opinion the Court stated: "Wealth or fee paying has, in our view, no relation to voting qualifications. The right to vote is too precious, too fundamental to be so burdened or conditioned."
>
> ...I am just wondering if you have changed the view that the Supreme Court was wrong in the Harper case to hold that poll taxes are unconstitutional?
>
> Judge Bork: I think it was [wrong], and I will tell you why....[I]f that had been a poll tax applied in a discriminatory fashion, it would have clearly been unconstitutional. It was not. I mean, there was no showing in the case. It was just a $1.50 poll tax.[20]

In its 1966 decision in Harper, the Supreme Court expressly found that the "Virginia poll tax was born of a desire to disenfranchise the Negro."[21] Putting the issue of racial discrimination aside, the poll tax issue poses an interesting test for the reasonable basis standard that Judge Bork has said he would apply in equal protection clause cases. It is clear from Judge Bork's testimony that he would find a state poll tax that prevented poor people from voting to be constitutional.

* "One Person, One Vote"

Judge Bork has expressed vigorous opposition to the Supreme Court's decisions establishing the rule of "one person, one vote." He finds no basis for these decisions in the Fourteenth Amendment:

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20 Hearing Transcript, September 15, 1987, pp.196-198.

21 383 U.S. at 666 n.6.

> Senator Kennedy: Let me go to the one man, one vote. In years past, one of the great obstacles to real democratic representation in the country occurred when state legislatures apportioned themselves in ways that systematically reduced the voting strength of particular constituencies, drawing election districts with different size populations [to] enable some groups to maintain more of their share of power at the expense of others...
>
> [Y]ou indicated on June 10th of this year, you said in an interview, "Well, I think this Court stepped beyond its allowable boundaries when it imposed one man, one vote under the equal protection clause."
>
> I think the people of this country, Judge Bork, accept the fundamental principle of one man, one vote even though they are not burdened with a law school education.
>
> Judge Bork: Well, Senator, if the people of this country accept one man, one vote, that is fine. They can enact it any time they want to. I have no desire to go running around trying to overturn that decision. But as an original matter, it does not come out of anything in the Constitution and if the people of the country want it, they can adopt that apportionment any time they want to.[22]

Former Texas Congresswoman Barbara Jordan put the harshness of Judge Bork's view in perspective when she explained the importance of the "one person, one vote" decision from her own experience during her testimony before this Committee:

> I filed for the election to the Texas House of Representatives. I ran. I lost. But I got 46,000 votes.
>
> I was undaunted. I said I will try again because I think my qualifications are what this community needs. So in 1964, I ran again for membership in the House of Representatives of the State of Texas. I lost. But I got 64,000 votes.

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22 Hearing Transcript, September 15, 1987, pp.199-203.

> Why could I not win? I will tell you why. The Texas legislature was so malapportioned that just a handful of people were electing a majority of the legislature. I was dispirited. I was trying to play by the rules, and the rules were not fair. But something happened. A decision was handed down: Baker v. Carr. That decision said this: The complainant's allegations of a denial of equal protection present a justiciable constitutional cause of action. The right asserted is within the judicial protection of the Fourteenth Amendment.
>
> Following Baker v. Carr, a series of cases were decided. The Texas legislature was required, mandated by the Supreme Court to reapportion itself. It reapportioned. So in 1966, I ran again. The third time. This time in one of those newly created State senatorial districts I won.
>
> My political career got started. Do you know what Judge Bork says about those cases on reapportionment? He has disagreed with the principle of one person, one vote, many times.
>
> In his confirmation hearings in 1973, this is what he said: "I think one man, one vote, was too much of a straight-jacket." And then he continued: "I do not think there is a theoretical basis for it."
>
> My word. "I do not think there is a theoretical basis for it." Maybe not, gentlemen. Maybe there is no theoretical basis for one person, one vote, but I will tell you this much. There is a common sense, natural, rational basis for all votes counting equally.[23]

Distinguished Duke University historian John Hope Franklin expressed his view that Judge Bork would have been a roadblock on the path of progress if he were sitting on the Supreme Court when critical civil rights issues were decided:

> Nothing in Judge Bork's record suggests to me that, had he been on the Supreme Court at an earlier date, he would have had the vision and the courage to strike down a statute requiring the eviction of a black family from a train for

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[23] Hearing Transcript, September 21, 1987, pp.116-117.

> sitting in the so-called white coach, or the rejection of a black student at a so-called white State university, or the refusal of a white restaurant owner to serve a black patron.
>
> As a professor, he took [a] dim view of the use of the commerce clause to protect the rights of individuals to move freely from one place to another, or to uphold their use of public accommodations....[24]
>
> * * * *
>
> ....There is no indication in his writings, his teachings or his rulings that this nominee has any deeply held commitment to the eradication of the problem of race or even of its mitigation.
>
> One searches his record in vain to find a civil rights advance that he supported from its inception. The landmark cases I cited earlier have done much to make this a tolerable, tolerant land in which persons of African descent can live. I shudder to think how Judge Bork would have ruled in any of them had he served on the Court at the time that they were decided.[25]

Judge Bork Does Not Recognize a Constitutional Right to Privacy.

For many years, Judge Bork has argued that the Constitution does not protect the right to privacy. He claims that the entire line of Supreme Court decisions vindicating such a right is improper. Judge Bork has sharply criticized the Supreme Court's decision invalidating a Connecticut law banning the use of contraceptives even by married couples in the home, Griswold v. Connecticut, 381 U.S. 479 (1965). In his testimony before this Committee, he reiterated his belief that the Court was not

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24 Hearing Transcript, September 23, 1987, p.59.

25 Hearing Transcript, September 23, 1987, p.61.

justified in finding a right of privacy in the Constitution because none was there:

> Senator Biden: Well, let's talk about the Griswold case...law...that it made it a crime for anyone, even a married couple, to use birth control. You indicated that you thought the law was "nutty," to use your words and I quite agree. Nevertheless, Connecticut, under that "nutty" law, prosecuted and convicted a doctor and the case finally reached the Supreme Court.
>
> The Court said that the law violated a married couple's constitutional right to privacy. You criticized this opinion in numerous articles and speeches.
>
> ...You argued that the utility company's right of gratification, I think you referred to it, to make money and the married couple's right of gratification to have sexual relations without fear of unwanted children, were "the cases are identical." Now, I am trying to understand this. It appears to me that you are saying that the Government has as much right to control a married couple's decision to have a child or not, as that Government has a right to control the public utility's right to pollute the air. Am I misstating your rationale here?
>
> Judge Bork: ...I was making the point that where the Constitution does not speak -- there is no provision in the Constitution that applies to the case -- then a judge may not say, I place a higher value upon a marital relationship than I do upon an economic freedom. Only if the Constitution gives him some reasoning. Once the judge begins to say economic rights are more important than marital rights or vice versa and if there is nothing in the Constitution, the judge is enforcing his own moral values, which I have objected to....
>
> Senator Biden: Then I think I do understand it, that is, that the economic gratification of a utility company is as worthy of as much protection as the sexual gratification of a married couple, because neither is mentioned in the Constitution.
>
> Judge Bork: All that means is that the judge may not choose.

Senator Biden: Who does?

Judge Bork: The legislature.[26]

Judge Bork also tried to minimize the significance of Griswold, referring to it as "a test case on an abstract principle." He said that it had never been enforced and asserted that any conviction under the Connecticut statute would indeed have had to be overturned; not because of the reasoning in Griswold, but because the statute at issue had remained unenforced for years before Griswold was decided:

> [I]f the prosecutor brought such a case, I do not think any court would uphold a conviction, assuming that you could get a conviction. That law had not been enforced for so long -- it is [an] utterly antique statute; I do not think it was ever enforced...[27]

During these hearings, the Judiciary Committee received a letter from one of the attorneys in Griswold, who explained that the Connecticut statute at issue had indeed been enforced in the years prior to the decision in Griswold:

> There is a decision of the Connecticut Supreme Court of Errors, dated March 6, 1940....[T]here was a prosecution of two doctors and a nurse in violation of the Connecticut statute against the use of contraceptives.
>
> ...[A]s a result of this decision, nine Planned Parenthood clinics which had been providing contraceptive services until they were closed, remained closed until the decision of the United States Supreme Court in Griswold v. Connecticut in

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26 Hearing Transcript, September 15, 1987, pp.128-130.

27 Hearing Transcript, September 16, 1987, p.49.

1965.[28]

In testimony during the second week of the hearings, Professor Tribe pointed out the extreme nature of Bork's views on privacy:

> [F]or 200 years a right has been recognized in one form or another....It just relates to the most down-to-earth fundamental things about marriage, family, parenthood. And it is only Judge Bork who says that that whole tradition is unconstitutional, is illegitimate....
>
> You can find some who have agreed in one case or another, but I have locked and I cannot find anyone who thinks that the whole development of these fundamental rights should just be wiped away.[29]

He explained that the right of privacy was the basis for many other Supreme Court decisions that in Judge Bork's view had been incorrectly decided:

> That means that it was wrong for the Court to strike down a State law forcing parents to send their children to public rather than private school; it was wrong to protect the right of parents, as the Supreme Court did, to decide what foreign languages their children would learn. It would surely be wrong to hold, as the Supreme Court did a few years ago, that a grandmother cannot be put in jail because she has chosen to live with the wrong set of grandchildren.[30]

Professor Tribe's view, Judge Bork's rejection of a right of privacy is emblematic of his judicial philosophy:

> He reads the entire Constitution as though the

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28 Letter to the Honorable Joseph Biden from Harriet F. Pilpel, September 16, 1987; Hearing Transcript, September 18, 1987, pp.216-217.

29 Hearing Transcript, September 22, 1987, p.107.

30 Id. at 22.

> people who wrote and ratified it gave up to Government all of the fundamental rights they fought a revolution to win unless a specific reservation of rights appears in the text.[31]

In these Hearings Judge Bork Abandoned His Repeatedly Stated View that the First Amendment Does Not Protect Art and Literature.

In a series of writings and speeches stretching from his 1971 Indiana Law Journal article to June 10, 1987 (3 weeks before he was nominated), Judge Bork crafted a disturbingly restrictive view that protection of the First Amendment applies only to speech that is "political." In 1971, Judge Bork wrote that the First Amendment "does not cover scientific, educational, commercial or literary expressions as such."[32] At the University of Michigan in 1979, Judge Bork reiterated this view: "[T]here is no occasion, on this rationale, to throw constitutional protection around forms of expression that do not directly feed the democratic process."[33]

In two interviews in May and June of 1987, Judge Bork explained that under his First Amendment theory, a court would have to look at each case to decide whether the book or movie was explicitly political, and, if not, whether it was reasonably

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31 Id. at 14.

32 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 28 (1971).

33 Speech, University of Michigan, February 5, 1979, p.8.

related to the democratic process.[34] Thus, as late as three weeks before his nomination to the Supreme Court, Judge Bork held the view that the First Amendment did not protect those forms of artistic or literary expression which did not relate in some fashion to the political process.

Judge Bork's testimony in these hearings marked a dramatic change from his well-articulated First Amendment theory. First, he noted repeatedly that he did not know whether the First Amendment protected non-political speech.[35] He also acknowledged that if the courts were to decide whether each book or movie contained political speech protected by the First Amendment, "it would place too great a burden upon the courts."[36] Further, he noted that existing Supreme Court precedent does not draw a line between political and non-political speech, and he told this Committee that he now accepts the First Amendment cases that protect a range of expression that are not explicitly political.[37]

Judge Bork Also Said He had Changed His View that the First Amendment Does Not Protect Speech Advocating Civil Disobedience.

34 Interview, PBS, May 28, 1987, pp.34-35; Worldnet Interview, June 10, 1987, pp.24-25.

35 See, e.g., Hearing Transcript, September 17, 1987, pp.20, 21, 190, 196; Hearing Transcript, September 18, 1987, p.88 (emphasis added).

36 Hearing Transcript, September 17, 1987, pp.191-92.

37 Id. at p.21; pp.190-96.

Until the confirmation hearings, Judge Bork's radical theory of the First Amendment also excluded from First Amendment protection speech that advocated the violation of law, including civil disobedience.

The protection of such speech under the First Amendment has been established for much of this century. Justices Oliver Wendell Holmes and Louis Brandeis noted that protection for speech challenging the government is the premise for our country's free speech traditions:

> "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[38]

The Holmes-Brandeis First Amendment tradition was reaffirmed in 1969 by a unanimous Supreme Court in Brandenburg v. Ohio, 395 U.S. 444 (1969). In that case, the Court ruled that speech advocating law violation can be restricted only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[39]

Prior to his confirmation hearings, Judge Bork rejected the Court's interpretation of the First Amendment in Brandenburg and in other Court decisions such as Hess v. Indiana, 414 U.S. 105 (1973), which applied variants of the tests spelled out by Holmes

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38 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

39 Brandenburg 395 U.S. at 447.

and Brandeis. In his 1979 Michigan speech, Judge Bork said:

> Hess and Brandenburg are fundamentally wrong interpretations of the First Amendment....[40]

He reaffirmed this view in the Worldnet interview, three weeks before his nomination. But on the second day of his confirmation hearings, Judge Bork assured the Judiciary Committee he believed that Brandenburg was correctly decided:

> [T]he Supreme Court has come to the Brandenburg position--which is okay; it is a good position--which is that you cannot be prosecuted for advocating violation of the law unless lawless action is imminent, or imminent lawless action may be caused. That is a good test, and it is very unlikely that the publication of a book advocating violation of the law would produce imminent lawless action.[41]

> Senator Leahy: Do you agree then, with the Brandenburg case?
>
> Judge Bork: Yes, I do.[42]

> [O]n the subject of speaking, advocating political disobedience or civil disobedience or advocating overthrow, I am about where the Supreme Court is.[43]

Senator Leahy noted that Judge Bork's testimony was

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40 Speech, University of Michigan, February 5, 1979, p.21 (emphasis added).

41 Hearing Transcript, September 16, 1987, p.115 (emphasis added).

42 Id. at 119.

43 Id. at 129 (emphasis added).

inconsistent with his prior position.[44]

The next day Judge Bork testified that he believed Brandenburg was wrongly decided, but that he "accepted" it as a judge:

> Now, what I am simply saying is I am not sitting here today telling you that if I write an article again as a law professor that I would say Brandenburg is wonderful. All I am telling you is that as a judge I accept Brandenburg as the law.[45]

Judge Bork Also Shifted His View that Each Community, Rather Than the Supreme Court Should Decide Whether "Offensive" Speech Is Protected by the First Amendment.

Prior to his confirmation hearings, Judge Bork had made clear his view that the prevailing standards in each community should be the guide for determining whether speech which some might find vulgar or offensive was to be censored or protected by the First Amendment. He repeatedly criticized the Supreme Court decision, written by Justice Harlan, in Cohen v. California, 403 U.S. 15 (1971). In that case, the Court held that the First Amendment protected an individual from prosecution for wearing a jacket bearing a political slogan containing vulgar language protesting the Vietnam War.

In two 1985 speeches, Judge Bork argued that each community should be permitted to decide which words were to be declared

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44 Id. at 120, 121.

45 Hearing Transcript, September 17, 1987, p.208 (emphasis added).

"obscene" and thus banned from public use:

> The Supreme Court majority [in Cohen] struck down the conviction on the grounds that regulation is a slippery slope and that moral relativism is a constitutional command. The opinion said, "The principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?"....The answer...is, by the common sense of the community.[46]

On the third day of these hearings, Judge Bork assured the Judiciary Committee that he believed that even if a community had decided a word was "obscene," the Supreme Court could and should make its own decision as to whether the word involved was obscene as a matter of constitutional law:

> Now in order to make sure that the First Amendment is being complied with, when a State punishes words as obscenity...the Supreme Court has to look, or some court has to look and say, did the State correctly classify those words as obscenity or as fighting words under the constitutional standard? If the State did not, then the Supreme Court should reverse the conviction and say you may not punish that speech.
>
> ....[T]he ultimate control of the definitions and categories of words must be in the Supreme Court, not in the State, if the First Amendment is to be upheld.[47]

On the fourth day, Judge Bork insisted that, although he still objected to Cohen, he believed that the Supreme Court should not accept a community's judgment that a particular word is obscene:

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46 Speech, Aspen Institute, August 13, 1985, p.6; see also Speech, West Point, April 9, 1985, p.6 (emphasis added).

47 Hearing Transcript, September 17, 1987, p.37 (emphasis added).

> I stated, and I still state, that in order to protect the First Amendment guarantees of free speech, the Court has to define what obscenity is and it may not allow a community to override that....
>
> I have no problem with that. I have never said anything to the contrary.[48]

Judge Bork Retreated From His Earlier View that the Bill of Rights Should Not Have Been Applied to the States.

For the last 60 years, the Supreme Court has held that the Fourteenth Amendment made the essential protections of the Bill of Rights binding on the states. Three weeks before his nomination, Judge Bork said that the framers of the Fourteenth Amendment had not intended the incorporation of the Bill of Rights:

> ...the incorporation of the Bill of Rights, which was applied only against the federal government, through the Fourteenth Amendment to apply against the states, was probably a Supreme Court invocation which the ratifiers had not intended.[49]

This statement is consistent with what Judge Bork said during a colloquium conducted in 1983 at the University of South Carolina. According to the recollection of two professors, Judge Bork stated that, in his view, the Fourteenth Amendment was not intended to incorporate the guarantees of the various provisions of the Bill of Rights against the states. He also "explicitly

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48 Hearing Transcript, September 18, 1987, pp.284, 287 (emphasis added).

49 Worldnet Interview, June 10, 1987, pp.4-5 (emphasis added).

stated that the First Amendment's protection for freedom of speech and the press should not have been held applicable to the states."[50]

At his confirmation hearing, Judge Bork voiced a different view of "original intent":

> ...[T]here has been more evidence which tends to show that incorporation was intended. It is very clear that Congressman Bingham, who wrote much of the clause and managed it in the House, and Senator Howard,...who was the member of the committee that drafted it and was the floor manager in the Senate, both of them clearly intended to incorporate not just the Bill of Rights, but any personal protection to be found in ...the original Constitution.
>
> So there is some pretty good historical evidence that it was intended.[51]

Judge Bork Failed to Acknowledge His Previous Views on Two Key Cases Involving the Application of Federal Laws to State Governments.

In 1985, in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), the Supreme Court overruled National League of Cities v. Usery 426 U.S. 833 (1976). The question at issue in both Garcia and Usery was whether the minimum wage provisions of the Fair Labor Standards Act could be constitutionally applied to state and local government employees.

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50 Letter to the Honorable Joseph R. Biden from William S. McAninch, Professor of Law, University of South Carolina, and Randall M. Chastain Associate Professor, September 21, 1987.

51 Hearing Transcript, September 18, 1987, p.4 (emphasis added).

In Usery, the Supreme Court held, by a 5 to 4 margin, that the statute, insofar as it applied to certain government workers, was unconstitutional because it infringed on the authority of the states to structure their internal operations and allocate their own resources. In a 1982 speech to the Federalist Society at Yale University, when Usery was still the law, Judge Bork announced that he agreed with the majority in Usery, expressing regret only that the Supreme Court did not go further in limiting the authority of Congress.

In Garcia, the Court overruled Usery and upheld the application of the Fair Labor Standards Act to state and local government bodies. Although the Reagan Administration was responsible for enforcing the federal law, it denounced the decision in Garcia in particularly harsh terms. Twice in 1986, in speeches at Attorney General conferences, Judge Bork reiterated his support for Usery, and argued that Usery had failed to survive because judges had not been sufficiently activist in attacking the authority of Congress to legislate in areas that affected state sovereignty:

> Looking back, it seems that National League of Cities v. Usery was correctly decided.[52]

In his testimony here, however, Judge Bork stated he had no opinion about these two cases, and that he believed it would be improper to express to the Senate Judiciary Committee any views

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52 Speech, Attorney General's Conference, January 24-6, 1986, pp.10-11; Speech, Attorney General's Conference, June, 1986, pp.10-11 (emphasis added).

he might have:

> Senator Grassley: Well, let me ask you this: Would you disagree with the Supreme Court's 1985 decision in Garcia v. San Antonio?
>
> Judge Bork: Well, I would not speak to that, for two reasons. One is I do not know, and two is I should not speak to it even if I did know...I really should not express an opinion on Garcia and National League of Cities out of propriety and also because I really have not got an opinion.[53]

Conclusion: Robert Bork Is Insensitive to the Principle of Simple Justice and Lacks the Requisite Judgment to Serve on Our Nation's Highest Court.

In his testimony before the Senate Judiciary Committee, Phoenix attorney and former Yale constitutional law professor John Frank expressed his reservations about Judge Bork's nomination by relating a story about the late Supreme Court Justice Hugo Black:

> ...[A]s you know, I was Judge Black's law clerk, his biographer and close friend,...[W]hen Justice Black was really distressed about what he felt was an injustice in a situation, just a plain injustice, because the judge is supposed to hold the scales of justice,...it certainly concerned Justice Black. And when he was really overwrought on such a thing, he would say, "You can't do people that way."
>
> ...You take the total judicial work of Judge Bork and it has obviously never concerned him that maybe you just can't do people that way.[54]

Judge Bork's record over two decades and his testimony before the

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53 Hearing Transcript, September 16, 1987, pp. 101-2 (emphasis added).

54 Hearing Transcript, September 23, 1987, pp.203-204.

Judiciary Committee reveal that the real impact of his views on people's lives is not a factor in his judicial equation. In his search for rigidly "neutral" principles, Judge Bork fails to consider the precepts of "justice" and "fundamental fairness."

In his statement to this Committee, former Attorney General Nicholas Katzenbach raised the question of Judge Bork's suitability for the Supreme Court in another way:

> [T]he central question that I would be asking myself would be this. Is Judge Bork a man of judgment -- not intellect, not reasoning, not lawyering skills, not ideology, not philosophy -- simply, judgment. Is he a wise person? Is he a person you would seek out if you had a difficult problem, for advice? Does he come through to you as the kind of person who is sensitive to human problems, to racial problems, to the role of political institutions, in resolving them?[55]

Attorney General Katzenbach found Judge Bork to lack the judgment that the Senate and the American people expect of those few who take lifetime seats on our nation's court of last resort:

> We also have to be conscious of the fact that in our Constitutional system, the Supreme Court was given an ultimate political role in guaranteeing people various freedoms -- freedoms from Government itself. And protecting those freedoms from Executive and Legislative abuse, and, though more rarely, from Executive and Legislative inaction, is an essential and important role of the Court.
>
> I am not sure that Judge Bork feels very comfortable with that role.[56]

Professor Tribe noted that Judge Bork's crabbed view of constitutional protections separates him from the 105 Supreme

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55 Hearing Transcript, September 21, 1987, p.268.

56 Hearing Transcript, September 21, 1987, p.271.

Court justices who have been confirmed during our nation's 200 year old "democratic experiment." Judge Bork, he testified, "would be the first to reject an evolving concept of liberty and to replace it with a fixed set of liberties protected at best from an evolving set of threats."[57]

Judge Bork's own words speak most clearly regarding his failure to grasp the Court's historic purpose of guaranteeing that the freedoms embodied in the Constitution are preserved for all Americans. When asked why he wanted to be a Supreme Court Justice, Judge Bork's reply did not speak of justice, fairness or the needs of people:

> It is...the court that has the most interesting cases and issues, and I think it would be an intellectual feast just to be there and to read the briefs and discuss things with counsel and discuss things with my colleagues....
>
> ...I would like to leave a reputation as a judge who understands constitutional governance and contributed his bit to maintaining it in the ways I have described before this Committee. Our constitutional structure is the most important thing this nation has and I would like to help maintain it and to be remembered for that.[58]

Contrast this statement with the words of a true conservative whom President Reagan appointed to the Supreme Court. On the occasion of her confirmation hearings, Sandra Day O'Connor stated:

> As a citizen and as a lawyer and as a judge, I have from afar always regarded the Court with the reverence and with the respect to which it is so

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57 Hearing Transcript, September 22, 1987, p.15.

58 Hearing Transcript, September 19, 1987, p.99.

> clearly entitled because of the function it serves. It is the institution which is charged with the final responsibility of insuring that basic constitutional doctrines will always be honored and enforced. It is the body to which all Americans look for the ultimate protection of their rights. It is to the U.S. Supreme Court that we all turn when we seek that which we want most from our government: equal justice under the law.[59]

In the course of the confirmation process, Judge Bork continued to espouse views hostile to the rights of privacy and other fundamental constitutional protections people have taken for granted. To the extent that he appeared to change his positions these newly adopted views over 5 days must be considered in light of his 25-year consistent record. We urge the Committee to oppose the confirmation of Robert Bork.

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59 Hearings before the Committee on the Judiciary of the United States Senate on the Nomination of Sandra Day O'Connor of Arizona to serve as an Associate Justice of the Supreme Court of the United States, 97th Congress, 1st Session, September 9, 1982, p.57.

APPENDIX A*

Bork's Controversial Positions Not Confined to Academic Career

Judge Bork and the White House have attempted to portray many of his controversial views and criticisms of Supreme Court precedents as merely the musings of a professor. Indeed, Senator Hatch has gone so far as to say that "professors are paid to be provocative." This summary of Robert Bork's statements critical of Supreme Court precedents during the period he served as a judge on the D.C. Circuit Court of Appeals, in addition to his statements included in the body of this memorandum on overruling precedent counters the notion that Bork's views should be discounted because they were merely the speculations of an academic.

Note: The attached list was compiled by the NAACP Legal Defense and Education Fund, Inc.

Date	Precedent Criticized
June 10, 1987	Application of the Equal Protection Clause to discrimination on the basis of sex; Craig v. Boren 429 U.S. 190 (1970) (Worldnet Interview, p.13)
June 10, 1987	Clear and present danger rule; Brandenburg v. Ohio, 395 U.S. 444 (1969) (Worldnet Interview, pp.30-1)
June 10, 1987	One person, one vote; Reynolds v. Sims, 377 U.S. 533 (1964) (Worldnet Interview, pp.22-3)
June 14, 1986	Constitutionality of applying federal minimum wage law to states; Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (Attorney General's Conference, p.10)
June 14, 1986	Free speech protects advocacy of lawful conduct government regards as contrary to "public morality" (Attorney General's Conference, p.10)
June, 1986	Right to privacy; Griswold v. Connecticut, 381 U.S. 479 (1965) ("An Interview with Judge Robert H. Bork," Judicial Notice, v.3, no.4, p.9, (June 1986)
September 12, 1985	Establishment Clause restrictions on government assistance to religion; Aguilar v. Felton, 87 L.Ed. 2d 290 (1985) (Speech, Brookings

Institution, pp.1,6)

90-839 0 - 89 - 16

September 12, 1985	Scope of the Free Exercise Clause; Wisconsin v. Yoder, 406 U.S. 205 (1972) (Speech, Brookings Institution, pp.1,6)
August 13, 1985	First Amendment protection; Cohen v. California, 403 U.S. 15 (1971) (Speech, Aspen, Colorado, p.6)
1985	Poll tax is unconstitutional; Harper v. Virginia Board of Elections, 383 U.S. 603 (1966) (R. Bork, "Forward", in G. McDowell, The Constitution and Contemporary Constitutional Theory, p.vii (1985))
November 13, 1984	Taxpayers have standing to challenge constitutionality of government aid to religion; Flast v. Cohen, 392 U.S. 83 (1968) (Speech, University of Chicago, pp.2-4)
1984	Constitution protects right to have an abortion; Roe v. Wade, 410 U.S. 113 (1973) (Washington Post, July 5, 1987, quoting 1984 interview)
January 15, 1983	Constitutional rights of patients in government mental hospitals; Youngblood v. Romeo, 457 U.S. 307 (1982) (Speech, South Carolina Bar Association, p.6)
January 15, 1983	Due Process rights of public school students; Goss v. Lopez, 419 U.S. 565 (1975) (Speech, South Carolina Bar Association, p.6)

March 31, 1982	Equal Protection Clause forbids discrimination against illegitimate children; Levy v. Louisiana, 391 U.S. 68 (1968) (Speech, Catholic University, pp.17-19)
March 31, 1982	Special constitutional scrutiny of laws disadvantaging minorities or interfering with the political process; United States v. Carolene Products Co., 304 U.S. 144 (1938) (Speech, Catholic University, p.17)
January, 1982	First Amendment protects art, fiction and other non-political speech unrelated to the democratic process (1982 Confirmation Hearing, pp.51-52)

APPENDIX B

Judge Bork's Reliance On Justices Who Dissented In The Cases He Has Attacked Does Not Move Him Into The Mainstream

Judge Bork has suggested that some of the modern Supreme Court's most distinguished Justices, such as John M. Harlan, Hugo Black, and Potter Stewart have often agreed with his attacks on Court decisions.

Although Judge Bork may be able to cite agreement with a particular dissenter on a particular case, none of the dissenters took issue with anywhere near the number of landmark cases on individual rights that Bork has denounced.

Justice Harlan may have dissented in the one-person, one-vote cases, but he was the Court's foremost advocate for protecting "fundamental liberties" under the Fourteenth Amendment, and he supported Congress's power to ban literacy tests nationwide -- both positions vehemently opposed by Bork.

Justice Black may have dissented on the right of privacy in marriage, but he was the Court's leading exponent of the broad right of free speech, and he voted consistently for the clear separation of church and state -- both positions, again, that Bork has opposed.

Justice Stewart may have taken positions that Bork endorsed on one-person, one-vote and the right to privacy, but he has consistently disagreed with every one of Bork's criticisms of many First Amendment cases on freedoms of speech, press, and

religion, as well as a national ban on literacy tests for voting.

In other words, looking at the total record of Bork's attacks on landmark Supreme Court decisions, no other Justice on the Supreme Court in modern times has so clearly opposed all or even most of the established, landmark decisions of the Supreme Court that Bork has denounced.

BACKGROUND POSITIONS OF JUSTICES BLACK, HARLAN AND STEWART IN KEY CASES BORK HAS ATTACKED

Of the landmark Supreme Court decisions that Bork has attacked: Justice Black participated in 13, and agreed with Bork on 4. Justice Harlan participated in 11, and agreed with Bork on 5. Justice Stewart participated in 20, and agreed with Bork on 8.

Justice Black, one of the great civil libertarians of our time, agreed with Bork's attacks less than one-third of the time.

Justice Harlan, the most distinguished proponent of "judicial restraint" of our time, agreed with Bork's attacks less than half of the time -- and his disagreements covered religion, speech, press, and privacy.

Justice Stewart, another well-respected moderate conservative, also agreed with Bork's attacks less than half the time -- and rejected Bork's position in eight out of nine cases involving speech and press freedom.

JUDGE BORK'S VIEWS REGARDING SUPREME COURT CONSTITUTIONAL PRECEDENTS

A Report of the NAACP Legal Defense and Educational Fund, Inc.

and

People For the American Way Action Fund

September 1987

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PREFACE

This report describes the Supreme Court decisions regarding constitutional law which Judge Bork has criticized over the last 19 years. In most instances Judge Bork has identified by name specific cases which he regarded as incorrectly decided; in other areas Judge Bork has advocated an interpretation of the Constitution which would clearly require overruling one or more existing decisions. Because most of Judge Bork's criticisms are found in documents that are not readily accessible, we have in general reprinted verbatim much or all of his arguments. We have also included, where appropriate, a brief evaluation of the present significance of the Supreme Court decisions to which Judge Bork has objected.

Because this report endeavors to describe all Supreme Court constitutional decisions with which Judge Bork has disagreed, the scope of this report is in many respects broader than the legal areas of concern to the Legal Defense Fund and People For the American Way. Many of the decisions discussed in the body of this report occurred in cases regarding which neither the Legal Defense Fund nor People For the American Way Action Fund take any position; the descriptions of these cases should not be understood that either organization now has, or intends to take, a position on such matters.

E.S.
R.L.S.
M.V.

SUMMARY

Judge Bork has repeatedly called for overruling Supreme Court constitutional decisions not based on what he perceives as the correct interpretation of the "original intent" of the Constitution's framers:

> Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended.[1]

Prior decisions, in Bork's view, should not prevent the Court from interpreting the Constitution anew in what it perceives to be the more correct manner:

> Supreme Court justice[s] always can say... [their] first obligation is to the Constitution, not to what their colleagues said 10 years before.[2]

Judge Bork believes that a majority of the most important Supreme Court constitutional decisions of the last 30 years are not legitimate interpretations of the text and origins of the Constitution:

> So far as I can tell, no writer on either side of the controversy thinks that any large portion of the most significant constitutional decisions of the past three decades could have been reached through interpretation.[3]

On 11 occasions since 1981 Judge Bork has denounced as a whole the Supreme Court's interpretation of the Constitution "over the

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1 Transcript, Speech to the Federalist Society, January 31, 1987, p.126 (emphasis added).

2 "Justice Robert H. Bork: Judicial Restraint Personified," California Lawyer, May, 1985.

3 Speech, Catholic University, March 31, 1982, p.5 (emphasis added).

past twenty-five years"[4] or "in the past thirty years."[5]

Judge Bork would bring to the Supreme Court a fairly specific agenda of precedents he wishes to overrule:

> Q. Can you identify any Supreme Court decisions that you regard as particularly worthy of reconsideration in the 1980's?
>
> A. Yes I can, but I won't.[6]

Although Judge Bork, in the interview quoted above, declined to specify which particular Supreme Court decisions he wanted the Court to reconsider, Judge Bork's public speeches and articles have indicated many of the constitutional precedents to which Judge Bork objects.

There are at least 31 major lines of precedent with which Judge Bork has disagreed. Although the summary which follows refers in most instances to only one or two cases, often there are a large number of other Supreme Court decisions applying the particular precedent with which Judge Bork disagrees. In all but a few instances Justice Powell either joined the decision to which Bork objects, or cited and approved it at a later date. In many instances the decisions to which Judge Bork objects were either unanimous when first rendered, or have subsequently been accepted by all members of the Supreme Court. In other cases, however, the Court has become closely divided on the issue, and a change in the membership of the Court could cause a change in the result.

(1) Roth v. United States (1957) held that the First Amendment guarantee of free speech extends to art, literature and scientific works. Judge Bork believes that the First Amendment covers such materials only in those cases in which they are directly related to politics and governmental affairs.

(2) Landmark Communications v. Virginia (1978) held that under the First Amendment a state cannot make it a crime to punish truthful information about government officials and activities. Judge Bork believes that such prosecutions would be permissible in any case in which the media printed information which "the State may lawfully keep secret."

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4 See, e.g., Speech, Federal Legal Council, October 29, 1981, p.5.

5 See, e.g., Speech, U.C.L.A., April 24, 1985, p.18.

6 "A Talk with Robert H. Bork," District Lawyer, v.9, no.5, p.32, May/June 1985.

(3) Cox Broadcasting Corp. v. Cohen (1975) held that the First Amendment protects a television station from being prosecuted for reporting the name of a crime victim, if that information was already part of the public record in a judicial proceeding. Judge Bork argues that the freedom of the press need not extend to such a case.

(4) Board of Education, Island Trees Union Free School District v. Pico (1982) held that under the First Amendment school officials could not remove a book from a school library if their motive was to suppress the ideas found in the book. Judge Bork believes that judicial intervention in such book banning cases is unwise, because he feels that there is no way to know why school officials disapproved of a specific book.

(5) Brandenburg v. Ohio (1969) and Hess v. Indiana (1973) held that under the First Amendment an individual cannot be prosecuted for speech that might be interpreted as approving unlawful action, unless there was clear advocacy of imminent unlawful conduct. Judge Bork believes that both cases were wrongly decided.

(6) Kingsley Corp. v. Regents (1959) held that a state may not interfere with the showing of a movie merely because the movie advocates or indicates approval of lawful behavior which the state regards as immoral or otherwise undesirable. Judge Bork believes that the First Amendment permits government officials to ban movies or other material likely to inculcate "attitudes, tastes and moral values" of which the government disapproves.

(7) Cohen v. California (1971) held that an individual could not be prosecuted for wearing a jacket on which was written "Fuck the Draft." The Court held that vulgar language was protected by the First Amendment because it might at times play an important role in conveying a speaker's message and feelings. Judge Bork believes that every community should be permitted to promulgate its own rules prohibiting the public use of certain prohibited words and phrases.

(8) Miller v. California (1973) held that speech is protected by the First Amendment if it has serious literary, artistic, political or scientific value, even though the work contains some material dealing with sex. Judge Bork believes that the publication of a serious or other work may be made a crime if any part of the work, judged in isolation, would be obscene.

(9) Buckley v. Valeo (1974) upheld the constitutionality of the Federal Election Campaign Act. Judge Bork believes that the Act is unconstitutional insofar as it sets limits on the size of

campaign contributions, and because it requires disclosure of such contributions.

(10) Wisconsin v. Yoder (1972) held that the Free Exercise Clause prevents a state from requiring Amish parents to send their children to public high schools. Judge Bork believes that Yoder was improperly decided, and would limit the Free Exercise Clause to cases in which a state acted for the purpose of penalizing religious observance.

(11) Aguilar v. Felton (1985) reiterated a long established 3 part test, accepted by Justice Powell and seven other members of the Court, for determining when government action violates the Establishment Clause. Judge Bork rejects that 3 part test, and would permit direct government financial support for religious activities so long as the subsidies were available to all sects.

(12) Flast v. Cohen (1968) held that a federal or state taxpayer may sue in federal court to enjoin government financial assistance to religion when that aid violates the Establishment Clause; all present members of the Court accept that rule. Judge Bork would forbid private suits to enforce the Establishment Clause except where the constitutional violation caused some special injury to a specific individual, a rule which would ordinarily make it impossible to enforce the Establishment Clause at all.

(13) Mapp v. Ohio (1961) holds that state prosecutors cannot ordinarily rely on evidence seized in knowing or willful violation of the Fourth Amendment. Judge Bork favors reconsideration of this exclusionary rule.

(14) Youngerblood v. Romeo (1982) held that a state could not, consistent with the Due Process Clause, confine a mentally ill or retarded individual against his or her will without providing some minimal treatment. Judge Bork believes that conditions in government-operated mental facilities are not subject to constitutional restrictions.

(15) Goss v. Lopez (1975) held that a public school student may not be suspended from school without first being told the charges against him, and being given some informal opportunity to present his or her version of the relevant facts. Judge Bork believes that all matters involving school disciplinary procedures should be left to the discretion of local authorities.

(16) Griswold v. Connecticut (1965) recognized the existence of a constitutional right to privacy, and held that a state cannot make it a crime for married couples to use birth control devices. Judge Bork believes that there is no constitutional right to privacy, and that Griswold was wrongly decided.

(17) Roe v. Wade (1973) held that a state may not forbid a woman to have an abortion during the early stages of a pregnancy. Judge Bork believes that Roe was "an unconstitutional decision."

(18) Meyer v. Nebraska (1922) held unconstitutional a state law which forbade the teaching of a foreign language to any student who had not completed the eighth grade. Judge Bork believes Meyer was "wrongly decided."

(19) Pierce v. Society of Sisters (1925) held unconstitutional a state law requiring that all children between 8 and 16 attend public school during regular school hours. Judge Bork disagrees with the decision in Pierce, although "perhaps" the same result could have been reached on some other ground.

(20) Shelley v. Kraemer (1948) held that state courts may not enforce a racially restrictive covenant forbidding the sale of a house to a black. Judge Bork believes that Shelley was incorrectly decided.

(21) Katzenbach v. Morgan (1966) and Oregon v. Mitchell (1970) upheld the provisions of the 1965 and 1970 Voting Rights Acts prohibiting the use of literacy tests as a condition of voter registration. Judge Bork believes that those portions of both civil rights statutes are unconstitutional.

(22) Reitman v. Mulkey (1967) and its progeny hold that a state may not adopt special constitutional barriers to the enactment of civil rights laws. Judge Bork believes that such barriers are constitutional.

(23) United States v. Carolene Products Co. (1938) contains in the famous footnote 4 the idea, from which many subsequent decisions derive, that special scrutiny should be applied to state laws that obstruct the political process, or that disadvantage unpopular minorities. Judge Bork believes that the principles stated in the footnote necessarily led to "subjective and arbitrary adjudication."

(24) Discrimination on the Basis of Sex -- For the past 14 years the Supreme Court has held that statutes which discriminate on the basis of sex violate the Equal Protection Clause unless those laws serve important closely related objectives. See, e.g. Wengler v. Druggists Mutual Ins. Co. (1980). Judge Bork believes that the Equal Protection Clause does not apply to discrimination on the basis of sex.

(25) Levy v. Louisiana (1968) and a series of subsequent decisions held that, in the absence of a compelling state interest, the Equal Protection Clause forbids discrimination against illegitimate children. Judge Bork believes that the Equal Protection Clause does not apply to discrimination on the

basis of illegitimacy.

(26) Discrimination Against Aliens -- The Supreme Court has repeatedly held that, in the absence of a compelling state interest, the Equal Protection Clause forbids discrimination against aliens. Judge Bork believes that the Equal Protection Clause does not apply to discrimination on the basis of alienage.

(27) Harper v. Virginia State Board of Elections (1966) and its progeny hold that, where fundamental rights are involved, a state may not impose special burdens on the poor. Judge Bork believes that Harper was wrongly decided.

(28) Skinner v. Oklahoma (1942) held that a state could not impose mandatory sterilization on some convicted felons, such as burglars, while exempting other convicted felons, such as embezzlers. Judge Bork believes that Skinner was wrongly decided.

(29) Reynolds v. Sims (1964) established the one person, one vote rule for legislative districting. Judge Bork rejects the one person, one vote rule, and would approve districting plans in which the votes of some voters were worth far more than the votes of others.

(30) Shapiro v. Thompson (1969) and its progeny hold that a state cannot, in the absence of some compelling state interest, impose special disadvantages on individuals who recently moved into the state. Judge Bork believes that Shapiro was wrongly decided.

(31) Garcia v. San Antonio Metropolitan Transit Authority (1985) rejected the argument that principles of federalism preclude Congress from requiring city agencies to pay the same minimum wage applicable to private employers. Judge Bork believes that Garcia was wrongly decided.

I. JUDGE BORK'S VIEWS REGARDING THE DESIRABILITY OF MAKING JUDICIAL APPOINTMENTS TO OVERTURN SUPREME COURT DECISIONS

Judge Bork believes that Supreme Court constitutional decisions ought to be overturned if at a later date the Court, composed of different justices, disagrees with those earlier decisions.

> Since the legislature can do nothing about the interpretation of the Constitution given by a court, the court ought to be always open to rethink constitutional problems....
>
> ...[A]t bottom, a judge's basic obligation or basic duty is to the Constitution, not simply to precedent.[7]

> Supreme Court justice[s] always can say... their first obligation is to the Constitution, not to what their colleagues said 10 years before.[8]

> [I]f a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior

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7 "A Talk with Robert H. Bork," District Lawyer, v.9, no.5, p.32, May/June 1985.

8 "Justice Robert H. Bork: Judicial Restraint Personified," California Lawyer, May 1985.

mistake by the court.[9]

Judge Bork is particularly amenable to overruling any Supreme Court decision that is "non-originalist," i.e., a decision which he believes cannot be justified as an interpretation of either the text of the Constitution or the intent of the framers:

> Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended.[10]

Judge Bork has candidly acknowledged that he has in mind a fairly specific agenda of Supreme Court decisions to be reopened:

> Q. Can you identify any Supreme Court doctrines that you regard as particularly worthy of reconsideration in the 1980's?
>
> A. Yes I can, but I won't.[11]

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9 Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1, 13 (hereinafter "1982 Confirmation Hearing").

10 Transcript, Speech to the Federalist Society, January 31, 1987, p.126. The same argument is handwritten in the prepared text of the speech, p.4. ("no problem w/ originalist judge overruling non-originalist decision").

11 "A Talk with Robert H. Bork," District Lawyer, vol.9, no.5, p.32, May/June 1985.

That agenda is clearly a long one, evidently including a majority of the important Supreme Court decisions of the last thirty years:

> The most dramatic examples of non-interpretivist review in our history are Lochner v. New York, Griswold v. Connecticut, and Roe v. Wade.... In not one of these cases could the result have been reached by the interpretation of the Constitution, and these, of course, are only a very small fraction of the cases about which that could be said.... So far as I can tell, no writer on either side of the controversy thinks that any large portion of the most significant constitutional decisions of the past three decades could have been reached through interpretation.[12]

The body of this report describes the large number of specific cases with which Bork has disagreed.

In 1985 Judge Bork suggested that an incorrect constitutional decision might have to be adhered to if major governmental or private institutions have been created or fashioned in reliance on that decision:

> There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not be overturned, even if they are thought to be wrong. The example I usually give,

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12 Speech, Catholic University, March 31, 1982, pp.4-5.

> because I think it's noncontroversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations, and so forth have been built up around that broad interpretation of the commerce clause that it would be too late, even if a justice or judge became certain that that broad interpretation is wrong as a matter of original intent, to tear it up and overturn it.[13]

The Commerce Clause cases are the only decisions which Judge Bork has suggested might have to be retained for this reason; none of the Supreme Court decisions regarding individual rights to which Judge Bork has objected appear to meet this standard. In 1986 Judge Bork suggested that it might indeed be practical to overturn some Supreme Court decisions regarding the scope of Congressional authority under the Commerce Clause, so long as the new limitations were not unduly rigid:

> The protection of federalism from national legislative power is more difficult. There are so many laws on the books, and so many Supreme Court decisions upholding them, and the federal government is involved in so many areas that a new, sharp-edged definition of national powers, such as commerce, taxing, and spending, would create chaos, politically, economically, and socially.[14]... Does it mean that we must give up judicial protection of federalism?

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13 "A Talk with Robert H. Bork," District Lawyer, vol.9, no.5, p.32, May/June 1985.

14 The text evidently contained a handwritten insertion at this point, but the speech was apparently photocopied in such a way that the insertion was not reproduced.

> It was this thought that for a time led me to think that we had passed the point of no return. I am no longer sure, though what I am about to say is to be understood as tentative and, indeed, speculative. It occurred to me that with respect to other values we do not insist upon and certainly have not achieved hard theory and bright-line tests. The courts have attained nothing like that with respect to the speech clause of the first amendment. Nevertheless, they have not abdicated protection of that constitutional value.
>
> Perhaps federalism can be protected in the same way.[15]

Judge Bork believes that appointing new justices willing to overturn Supreme Court decisions is an entirely appropriate method for altering constitutional precedents:

> Democratic responses to judicial excesses probably must come through the replacement of judges who die or retire with new judges of different views.[16]

> The only cure for a Court which oversteps its bounds that I know of is the appointment power, and in addition to that the power of debate...[17]

> Amending the Constitution is not a general solution to judicial expansionism; there are

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15 Speech, Attorney General's Conference, June 14, 1986, p.10.

16 R. Bork, "Judicial Review and Democracy," Encyclopedia of the American Constitution, v.3, p.1062 (1986).

17 1982 Confirmation Hearing, p.7.

> too many serious judicial excesses to make amendment a feasible tool of correction.... [T]he answer can only lie in the selection of judges, which means that the solution will be intermittent, depending upon the President's ability to choose well and his opportunities to choose at all.[18]

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18 R. Bork, "'Inside' Felix Frankfurter," The Public Interest, Fall Book Supplement, 1981, pp.109-110.

II. JUDGE BORK'S OBJECTIONS TO SPECIFIC CONSTITUTIONAL DECISIONS

Over the last 19 years Judge Bork has denounced a wide variety of Supreme Court decisions. The discussion which follows describes the decisions to which he has voiced specific objections. It would be a mistake, however, to assume that this is a complete list of the constitutional decisions which Judge Bork believes to be incorrect. Judge Bork has repeatedly described his criticism of Supreme Court precedents in expansive terms:

> [N]obody believes the Constitution allows, much less demands, the decision in Roe v. Wade or in dozens of other cases of recent years.[19]

> S.158... is unconstitutional.... [But] S.158 proposes a change in our constitutional arrangements no less drastic than that which the judiciary has accomplished over the past 25 years.[20]

> [Advocates of court stripping legislation] propose a change in our constitutional arrangements no more drastic than that which the judiciary, led by the Supreme Court, have themselves accomplished over the past twenty-five years. The courts, acting without any

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19 Hearings on the Human Life Bill before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., p.315 (1981) (emphasis added).

20 Id. at 310 (emphasis added) (this 25 year period encompasses cases decided in or after 1956).

plausible constitutional warrant, have required so many basic and unsettling changes in American life and government that a political counterattack was inevitable. Indeed, in many ways, that counterattack is a healthy sign of vitality of, and our attachment to, democratic government.[21]

[W]e have seen, in the last twenty-five years, a radical expansion of the First Amendment. We have seen a radical expansion of the Equal Protection Clause.[22]

With a degree of adventurism -- some might call it imperialism -- unknown until thirty years ago, federal courts have found in the Constitution a warrant for thrusting themselves into areas of life that this nation had always supposed properly governed by elected officials. Schools, mental homes, prisons. The entire area of individual sensibility. Unless this attitude changes, who knows 30 years [sic].... The results of all this have been horrendous not least for the judicial system.[23]

[J]udicial review, particularly under the due process and equal protection clauses, is now reaching results that cannot be justified by any conventional mode of legal interpretation. I wish rather to suggest an hypothesis about why the Court behaves as it does and moves in the direction that it has for the past twenty or twenty-five years. It ought at least to be a matter of some curiosity that, after the radical egalitarianism of the Warren years, we see

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21 Speech, Federal Legal Council, October 29, 1981, p.5 (emphasis added).

22 Speech, Federalist Society at Yale, April 24, 1982, p.7 (emphasis added).

23 Speech, South Carolina Bar, January 15, 1983, p.6.

today a moderately conservative Court still producing moderately liberal, egalitarian results.[24]

[Under the moral approach to constitutional law]... the judge rules wherever he sees fit and the legislature exists at the sufferance of the judiciary. There are political reasons why this will not happen at once but it can happen gradually, as the past 30 years have taught us.[25]

We never elaborated much of a theory -- as distinguished from mere attitudes -- about the behavior proper to constitutional judges. As Alexander Bickel observed, all we ever had was a tradition and in the past thirty years that has been shattered.[26]

[T]he Court... began in the mid-1950's to make... decisions for which it offered little or no constitutional argument.... Much of the new judicial power claimed cannot be derived from the text, structure, or history of the Constitution.[27]

Forty years ago no one could have imagined the extent to which, in area after area, judges would claim ultimate power over our

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24 Speech, Harvard Law School Asso., September 15, 1983, p.4 (emphasis added).

25 Speech, UCLA, April 24, 1985, p.18 (emphasis added).

26 Speech, West Point, April 9, 1985, p.12 (emphasis added); Francis Boyer Lecture, American Enterprise Institute, 1984, p.10 (emphasis added) (this 30 year period would encompass cases decided in or after 1954).

27 R. Bork, "Judicial Review and Democracy," Encyclopedia of the American Constitution, v.3, p.1062 (1986) (emphasis added).

lives.[28]

Of the eleven comments cited above, eight were made after Bork became a judge. During approximately half of the thirty year era referred to by Judge Bork, it should be noted that the Chief Justice was Warren Burger,[29] and a majority of the Justices had been nominated by Republican presidents.[30]

The discussion which follows, describes the specific Supreme Court constitutional decisions to which Judge Bork has objected with a reasonable degree of specificity and firmness. A number of Judge Bork's other comments, although potentially of equal or greater significance, are somewhat more ambiguous. While Judge Bork has repeatedly stated that he favors the exercise of judicial review, the power of the Supreme Court to invalidate a state law if it conflicts with the Constitution, he has also suggested that the practice of judicial review may have no historical foundation.[31] Although some officials of the Justice

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28 Speech, The Philadelphia Society, April 3, 1987, p. 6.

29 Justice Burger joined the Court in June, 1969.

30 Republican appointees have been in the majority since Justice Blackmun became a member of the Court in June, 1970.

31 Speech, University of Southern California, October 25, 1984, p. 16, ("[Professor] Ely... assumes... that judicial review was clearly intended, which is not at all clear."); "An Interview with Judge Robert H. Bork," Judicial Notice, v.3, no.4, p.10 (1986) ("[The framers] probably weren't even thinking about judicial review as a problem. In those days, nobody had ever seen

Department have argued that the Bill of Rights does not apply to the states, apparently Judge Bork has gone no further than to express an open mind on the subject.[32] Judge Bork has also expressed, in terms too general to provide guidance as to which

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judicial review.")

[32] Unedited transcript of an interview with Judge Bork for California Lawyer Magazine, January 24, 1985, pp.6-7:

"If a judge decided that the incorporation doctrine was wrong -- and I'm not expressing an opinion about the doctrine itself -- if he decided it was wrong and wanted to undo parts of it, he would have to look at the particular instance to ask whether it was a rule that could easily be changed without doing any great damage or whether it was one such as the commerce clause, around which institutions had gathered and had relied upon and much of our national interest rested upon... Again, I'm not really saying anything, I'm really describing to you a kind of standard understanding. Justice Harlan, the younger Harlan, argued for applying the Bill of Rights and so forth in a different way to the states than its applied to the Federal government, recognizing their different positions. In a way, he was suggesting a modification of incorporation doctrine. A lot of people have done that or suggested that and what the future of that is, I don't know."

Worldnet Interview, June 10, 1987, pp.4-5:

"JUDGE BORK: The Supreme Court has certainly changed the Constitution over time. I tend not to be too pleased with that. I think the changes themselves were probably good, but they probably should have come to an amendment process.... [T]he incorporation of the Bill of Rights, which was applied only against the federal government through the Fourteenth Amendment to apply against the states, was probably a Supreme Court innovation which the ratifiers had intended."

specific cases he believes wrongly decided, broad criticism of the Supreme Court decisions interpreting the First,[33] Eighth,[34] and Fourteenth Amendments.[35]

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33 Speech, Federalist Society, Yale University, April 24, 1982, pt.1, p.7, ("We have seen, in the last twenty-five years, a radical expansion of the First Amendment"), pt.2, pp.9-10 (among the "nationalizations of morality, not justified by anything in the Constitution" is "the extension of the First Amendment to all kinds of behavior that one would not have thought implicated the values of free speech."); Notes for Speech, N.Y.U. Law Review Banquet, May 1, 1982, p.3 ("The dramatic expansion of const[itutional] rights under... 1st Amendment -- nationalizes moral and social values although there is no national consensus")

34 "An Interview with Judge Robert H. Bork," Judicial Notice, v.3, no.4, pp.5-6 ("the non-interpretivists... [say], 'Well, the standard, for example, of what is a cruel and unusual punishment under the Eighth Amendment is an evolving standard. It moves with society's new consensus about what is consistent with human dignity, what is too cruel, etc.,etc.'... But it is not made clear why the standard should evolve.")

35 Speech, Federal Legal Council, October 29, 1981, p.6 ("It speaks volumes about the deterioration of the equal protection concept that it was even possible to take seriously a challenge to the constitutionality of the male-only draft."); Speech, Federalist Society, April 24, 1982, p.7 ("we have seen, in the last twenty-five years,... a radical expansion of the Equal Protection Clause....").

A. FREE SPEECH

1) Roth v. United States, 354 U.S. 476 (1957). In Roth the Supreme Court held that obscenity is not protected by the First Amendment, and affirmed the convictions of several individuals found guilty of violating federal and state obscenity statutes. In the course of its opinion the Court observed that the constitutional guarantee of free speech does extend to "art, literature, and scientific works." 354 U.S. at 487.

In 1971 Judge Bork argued that Roth had erred in applying the First Amendment to any form of speech which was not political:

> The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial, or administrative. Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection....Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives.[36]

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[36] Robert Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 27-28 (1971).

Judge Bork reiterated that view in a 1974 interview:

> "The Constitution sets up a structure in which free speech about public opinions and politics is absolutely indispensable. You can't run a democracy without it."
>
> Since not all speech is protected under the First Amendment, [Bork] continued, the problem was to find a line of distinction so that a judge would not have to intrude his own political preference.
>
> "I would be appalled," Bork said, "if people suppressed a novel or a scientific work or if you couldn't teach evolution -- or algebra. We might revert to the Stone Age."
>
> "What I was suggesting was that in those things we can appropriately rely on the good sense and level of sophistication of the general community."....
>
> "I deal in ideas. I like books. I have absolutely no desire to see any of that cut into. But that is a class preference in a way. In the lecture I was trying to arrive at positions that were free of such personal preferences or biases."[37]

During a speech given in 1979,[38] Judge Bork reiterated his view that the First Amendment protected only political speech:

> The Constitution provides for a republican form of government, which is meaningless

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37 "Solicitor General Clarifies Free-Speech Views," Los Angeles Times, February 5, 1974.

38 Judge Bork indicates the speech was given in 1977 or 1978. According to the University of Michigan Law School, the speech was given on February 5, 1979.

> unless citizens are free to discuss and write about political men and issues. Freedom of political speech follows directly from the structure and functions of the government the Framers created. This is a form of constitutional construction employed by Chief Justice Marshall in McCulloch v. Maryland, used by James Madison in arguing against the Sedition Law on First Amendment grounds, and made fully articulate by my colleague, Charles Black. We should have had to arrive at the judicial protection of political speech even if there were no First Amendment.
>
> Commonly, there is something around a core, and political speech would have little sustenance without a large degree of protection for the transmission of news and information relevant to the political process. But there is no occasion, on this rationale, to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation.[39]

During his 1982 confirmation hearing for the Court of Appeals Judge Bork testified that he would of course obey the Supreme Court decisions regarding the scope of the First Amendment, regardless of whether they were in conflict with his 1971 article:

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[39] Speech, University of Michigan, February 5, 1979, pp.8-9.

> THE CHAIRMAN: ...[An] article which appeared in the 1971 Indiana Law Journal entitled "Neutral Principles and Some First Amendment Problems," contains statements which have caused some individuals to suggest that you may feel that the first amendment protects only speech which is explicitly political. Will you discuss this article, and in particular give your response to the charge of limiting first amendment protection to political speech?
>
> MR. BORK: ...Within the speech area, I was dealing with an application of Prof. Herbert Wechsler's concept of neutral principles, which is quite a famous concept in academic debate. I was engaged in an academic exercise in the application of those principles, a theoretical argument, which I think is what professors are expected to do.
>
> It seems to me that the application of the concept of neutral principles to the first amendment reaches the result I suggested. On the other hand, while political speech is the core of the amendment, the first amendment, the Supreme Court has clearly expanded the concept well beyond that. It seems to me in my putative function as a judge that what is relevant is what the Supreme Court has said, and not my theoretical writings in 1971.[40]

Senator Thurmond's question was apparently prompted by the fact that the only witness who opposed Judge Bork's nomination expressly objected, in his prepared statement, to Judge Bork's view that the First Amendment protected only political speech.[41] Judge Bork responded to this criticism and Senator Thurmond's inquiry by indicating that although he still agreed with his 1971

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40 1982 Confirmation Hearing, pp.4-5 (emphasis added).

41 Id. at 51-52.

analysis, he would accept and enforce binding Supreme Court precedent to the contrary.

In 1983 a journalist preparing an article on Judge Bork's views asked Judge Bork's office for copies of other statements he had made on the subject since the 1971 article. Judge Bork's law clerk, in a letter declining to provide the material, wrote "On behalf of Judge Bork, I am sorry that we could not assist you more in your First Amendment study. I hope that the pieces Judge Bork has already published on the subject will suffice for your work."[42] On October 1, 1983, the journalist, understandably assuming from that response that Judge Bork's published work still represented his views, published an article arguing that, particularly because of his view that the First Amendment covered only political speech, it would be unwise to appoint Judge Bork to the Supreme Court.[43] Judge Bork did not respond to or comment on this description of his interpretation of the First Amendment in The Nation. The ABA Journal subsequently carried a column summarizing the Nation article. In February Judge Bork wrote the ABA Journal a strongly worded letter describing the Nation article as "out of date and seriously mistaken":

As a result of the responses of scholars to

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42 J. Kalven, "Round Two for Judge Bork," The Nation, June 16, 1984, p.732.

43 J. Kalven, "Robert Bork and the Constitution," The Nation, October 1, 1983, pp.262-68.

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> my [1971] article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection. I have repeatedly stated this position in my classes.[44]

In a January, 1985 interview, Judge Bork commented, regarding his December 1984 opinion in Ollman v. Evans, 750 F.2d 970 (1984), "I thought the purpose of the First Amendment, its central purpose, is to keep a political discourse open about how we govern ourselves.... I think if some new development begins to burden the political discourse it's proper to try to adjust doctrine to keep the political discourse open." In an interview later that year Judge Bork responded to the suggestion by one commentator the position taken by "the new Bork" in Ollman would have been rejected by "the old Bork"[45]:

> He's quite wrong about the old Bork.... [T]he First Amendment enjoins judges to keep the process of political discussion open. If judges change the way libel law is applied, and they have, so that it begins to represent a threat to political discussion, then in an opinion like Ollman... I think I am defending the central meaning of the First Amendment if I say, "Wait a minute. This particular lawsuit poses too much of a threat to political discussion and the freedom of the press."[46]

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44 "Judge Bork Replies," ABA Journal, v.70 (February, 1984).

45 Unedited transcript of an interview with Judge Bork for California Lawyer Magazine, January 24, 1985, pp.8-9.

46 "An Interview with Judge Robert H. Bork," Judicial Notice, v.3, no.4, p.11, June 1986.

In a 1986 speech Judge Bork identified himself as one "who think[s] that political processes are the core of the First Amendment."[47]

In an interview aired in May 1987, Judge Bork indicated that in his view a statement which was not explicitly political would nonetheless fall within the protection of the First Amendment wherever it was reasonably related to the political process:

> MOYERS: Why do you think [the framers] provided protection for speech as distinct from conduct?
>
> BORK: Speech is essential to running a republican form of government. It's -- even if there were no First Amendment, you'd look at the structure of that Constitution, which envisages elections and so forth, and you'd say without speech this thing isn't gonna work. It has to be protected.
>
> MOYERS: Do you think they were dealing primarily, at least in their frame of things, with speech of republic, the speech of the political universe that we operate in as citizens?
>
> BORK: Sure. But in addition to that, I'm sure they recognized that other kinds of speech, speech about moral issues, speech about moral values, religion and so forth, all of those things feed into the way we govern ourselves. So it doesn't have to be explicitly political speech to be protected.
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> MOYERS: So novels...

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47 Speech, Federalist Society, Stanford University, March 7, 1986, p.7.

BORK: Scientific speech...

MOYERS: Art...

BORK: I think you're getting towards the outer edge there and where you draw the line would be on a case by case basis.

MOYERS: But, surely art is sometimes the most political of all expressions.

BORK: Oh, it can be, it can be.[48]

In June 1987, Judge Bork reiterated his proposed case-by-case approach:

> My views on the First Amendment [in the 1971 article], I think, have changed only to the extent that in an effort to find a bright line for judges to follow, I said the First Amendment really ought to protect only explicitly political speech. It now strikes me that I purchased a bright line at the expense of a rather more sensible approach.
>
> There is a lot of moral and scientific speech which feeds directly into the political process. There is simply no point in making people tack on "and therefore let's pass a law" in order to make a protected speech. I am afraid that I am no longer somebody who has bright lines in many of these areas, as I once thought I could find.
>
> I cannot tell you much more than that there is a spectrum of, I think political speech -- speech about public affairs and public officials -- is the core of the amendment, but protection is going to spread out from there, as I say, in the moral speech and the scientific speech, into fiction and so forth.
>
> There comes a point at which the speech

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48 Interview, Public Television, May 28, 1987, pp.34-35.

> no longer has any relation to those processes. It is purely a means for self-gratification. When it reaches that level, speech is really no different from any other human activity which produces self-gratification.[49]

This case-by-case approach is reflected in Judge Bork's opinion in McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460 (D. C. Cir. 1983), a libel case that arose out of a scientific dispute over the safety of the drug Bendectin. Judge Bork wrote:

> Bendectin has been an widely used drug for which there appears to be no adequate substitute. Thousands of people are acutely concerned about its safety. Because it was a matter of intense public debate whether the FDA should take action, the controversy about Bendectin had a pronounced political component.

717 F.2d at 1466. This case-by-case inquiry into whether speech which is not explicitly political may nonetheless be closely related to the political process is consistent with Judge Bork's frequently stated view that the First Amendment was not adopted to cover speech which is mere "self-expression."

(2) Landmark Communications, Inc. v. Virginia, 439 U.S. 829 (1978). In 1975 the Virginia Pilot, a local newspaper owned by Landmark Communications, published an article which disclosed the

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49 Worldnet Interview, June 10, 1987, pp.24-25.

name of a judge who was under investigation by the Virginia Judicial Inquiry and Review Commission. The newspaper was subsequently indicted and convicted for having violated a criminal prohibition against disclosing the name of any judge under investigation by the Commission.[50] The Supreme Court unanimously overturned the newspaper's conviction, holding that, regardless of whether a state might be able to forbid Commission employees from disclosing such information, it could not punish a newspaper for publishing the information once it was divulged. Chief Justice Burger, writing for the Court, explained:

> "Whatever differences may exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to promote the free discussion of governmental affairs."... The operations of the courts and the judicial conduct of judges are matters of utmost public importance.... "The press... guards against the miscarriage of justice by subjecting the... judicial processes to extensive public scrutiny and criticism."... The operation of the Virginia Commission, no less than the operation of the judicial system itself, is a matter of public interest.... The article published by Landmark provided accurate factual information about a legislatively authorized inquiry pending before the Judicial Review and Inquiry Commission, and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.

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50 In 1977 the publisher of two Richmond newspapers was twice convicted under the same statute. 435 U.S. at 834 n.3.

435 U.S. at 838-39 (footnotes omitted). Justice Stewart, in a concurring opinion, noted that the state might be able to punish employees for disclosing the sort of information involved, but argued that "If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish." 435 U.S. at 849.

In 1978 Judge Bork criticized this and a number of other decisions of the Burger court protecting freedom of the press:

> In Landmark Communications v. Virginia the State was disabled from punishing publication of material wrongfully divulged to it about a secret inquiry into alleged judicial misconduct.
>
> In some of those cases, it is possible to believe, the press won more than perhaps it should have.... [O]ne may doubt that press freedom requires permission... to publish the details of an investigation which the State may lawfully keep secret. These cases are instances of extreme deference to the press that is by no means essential or even important to its role.[51]

Judge Bork's criticism of Landmark has ramifications that reach well beyond the facts of that case. Judge Bork suggests that, so long as the government "may lawfully keep secret" an item of information by forbidding its disclosure to the press, the government may constitutionally keep that information secret

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[51] Speech, University of Michigan, February 5, 1979, p.10.

by punishing any newspaper which prints it. So far as the constitution is concerned, the government "may lawfully keep secret," by directing its employees to refuse to divulge, almost any information it pleases, except with regard to the proceedings of a public trial subject to the Sixth Amendment. The Supreme Court has always carefully distinguished the broad authority of the government to withhold information, and the extraordinarily narrow circumstances under which the government may punish the press for publishing information obtained by a reporter or editor.

As Chief Justice Burger explained in Houchins v. KQED, Inc., 438 U.S. 1 (1978):

> This court never intimated a First Amendment guarantee of a right of access to all sources of information within government control.... Grosjean v. American Press Co. [297 U.S. 233 (1938)] and Mills v. Alabama [384 U.S. 214 (1966)] emphasized the importance of informed public opinion and the traditional role of a free press as a source of public information. But an analysis of those cases reveals that the Court was concerned with the freedom of the media to communicate information once it is obtained; neither case intimated that the Constitution compels the government to provide the media with information or access to it on demand.... [N]othing in the Court's holding [in Grosjean] implied a special privilege of access to information as distinguished from a right to publish information which has been obtained.... The reference to a public entitlement to information meant no more than that the government cannot restrain communication of whatever information the media acquires -- and which they elect to reveal. Cf. Landmark

> Communications, Inc. v. Virginia.... There is an undoubted right to gather news "from any source by means within the law"... but that affords no basis for the claim that the First Amendment compels others -- private persons or governments -- to supply information.

438 U.S. at 9-11 (emphasis in original). Thus, although KQED had a constitutionally protected right to broadcast any information it could obtain about the Santa Rita jail, the government facility at issue in Houchins, jail officials could constitutionally attempt, by barring reporters from the jail, to keep secret the conditions inside. The government has broad authority to discipline its employees[52] for leaking information the government wishes to keep secret, but has virtually no authority -- except in cases involving a serious threat to the national security -- to punish the media for publishing that information once leaked. Compare Snepp v. United States, 444 U.S. 507 (1980) with New York Times v. United States, 403 U.S. 713 (1971).

Judge Bork's comments regarding Landmark Communications suggests that this distinction should be eliminated, and that the extremely limited authority of the government to punish publication of highly sensitive national security information be expanded to permit authorities to punish publication of the far

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52 The ability of the government to control private parties in possession of information it wishes to keep secret apparently lies somewhere between these two extremes.

larger body of information which the government may lawfully "keep secret." This new authority would not be limited to information classified as "top secret" or "secret" or classified at all; so long as the government could constitutionally forbid government employees from giving certain information to the press -- and that would be the case in an enormous number of situations -- the government could prosecute newspapers for printing the information itself.

(3) Cox Broadcasting Corp v. Cohen, 420 U.S. 469 (1975). This case arose out of the rape and murder of a Georgia woman. Six defendants were charged with rape and murder, and subsequently pled guilty to the rape charges. The name of the victim was disclosed in the indictment, which was made public at the time of the guilty plea. A local television station, in the course of a story about the plea bargain, broadcast the name of the victim. The victim's father sued the television station for damages, alleging that the story violated the right to privacy of his deceased daughter. Although there was a Georgia statute declaring it a misdemeanor for "any news media" to publish or broadcast the name of any rape victim, the Georgia State Supreme Court held that the statute did not create a civil cause of action on behalf of the victim. The State Supreme Court also held, however, that the father of a rape victim could bring a common law action "for invasion of his own privacy by reason of the publication of his daughter's name." 420 U.S. at 475.

The United States Supreme Court reversed, holding that the First Amendment prohibited any award of damages for broadcasting truthful information that was already in the public domain. Eight members of the Court, in an opinion joined by Justice Powell, emphasized that the name of the victim had already been disclosed, and was available to any Georgia citizen who went to Fulton County courthouse:

> "A trial is a public event.... Those who see and hear what transpired can report it with impunity".... The developing law surrounding the tort of invasion of privacy recognizes a privilege in the press to report the events of judicial proceedings.... [T]he interests in privacy fade when the information involved already appears on the public record.

420 U.S. at 492-5 (emphasis in original). The Court also stressed that news accounts about judicial proceedings were part of the information which the electorate needed to evaluate the functioning of government officials and agencies:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us would be unable to vote

> intelligently or to register opinions on the administration of government generally.... The commission of crime, prosecutions resulting from it, and judicial prosecutions... are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of the government.

420 U.S. at 491-92.

In 1979 Judge Bork, in the same speech in which he discussed Landmark Communications, criticized Cox Broadcasting as well:

> In Cox Broadcasting Corp v. Cohn [sic] a statute prohibiting the publication of a rape victim's name was held invalid....
>
> In some of those cases, it is possible to believe, the press won more than perhaps it ought to have.... [O]ne may doubt that press freedom requires permission to publish a rape victim's name.... These cases are instances of extreme deference to press that is by no means essential or even important to its role.[53]

(4) Board of Education, Island Trees Union Free School District v Pico, 457 U.S. 853 (1982). This case involved a challenge to the action of local school officials in removing certain books from the library of the local high school. They acted after the officials had attended a meeting of what the Court described as a "politically conservative organization,"

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53 Speech, University of Michigan, February 5, 1979, pp.9-10.

which provided them with a list of "objectionable" books. The authorities discovered that 9 of the proscribed books were in the high school library and ordered them removed.[54] A plurality of the court held that the removal of such books would be unconstitutional if the school officials had chosen the books to be removed

> in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation ordered the removal of all books written by or in favor Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of ideas. Thus whether [the officials'] removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind [the officials'] actions. If [the officials] intended by their removal decision to deny respondents access to ideas with which [the officials] disagreed,... the [the officials] have exercised their discretion in violation of the Constitution.

457 U.S. at 870-71 (emphasis in original).

In the spring of 1982, shortly before Pico was decided, Judge Bork commented:

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[54] The books included the Naked Ape by Desmond Morris, and The Best Short Stories by Negro Writers, edited by Langston Hughes.

> I do not know what it means to say that you cannot ban books because I do not know how you know whether people are banning books. They have to use their resources in some way and make choices. I do not know how one knows why they did not buy a particular book.[55]

In response to a question noting that the issue in Pico concerned the removal of books already acquired, rather than the acquisition of new books, Judge Bork commented:

> In ten years that will be a problem that will pass because the books will be gone and then the question is what do you replace.[56]

In Bork's view, because it is inherently impossible to know why school officials did not purchase a book, it would in practice be meaningless to refer to any such acquisition decision as "banning" the book; the logic of that analysis would seem fairly applicable to the decision to remove a book, since it would not necessarily be any easier to determine in such a case why the book had been removed. Although the plurality in Pico concluded that a plaintiff could prevail if he proved local officials acted to prevent communications of ideas with which they disagreed, Judge Bork's comments suggest it may be impossible to prove why

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55 Speech, Federalist Society, Yale University, April 24, 1982, pp.2-3, pt.2.

56 Id. at 3.

local officials make such decisions. Judge Bork does not appear to have commented on Pico since it was decided.

(5) Brandenburg v. Ohio and Hess v. Indiana. Brandenburg v. Ohio, 395 U.S. 444 (1969), was a unanimous decision which codified the reigning First Amendment rule regarding speech and advocacy related to violent or otherwise unlawful action:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce such action.

395 U.S. at 447. The rule in Brandenburg has its roots in a series of famous early twentieth century dissents by Justices Holmes and Brandeis. The decision in Brandenburg was applied by the Supreme Court to overturn a criminal conviction for disorderly conduct in Hess v. Indiana, 414 U.S. 105 (1973), in a majority opinion joined by Justice Powell.

Judge Bork believes that Brandenburg and Hess were wrongly decided. The earlier Holmes opinion, he argued, "lapses into severe internal contradiction, while Brandeis' dissents are less arguments than assertions."[57] Bork insists:

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57 Speech, University of Michigan, February 5, 1979, p.19.

> Hess and Brandenburg are fundamentally wrong interpretations of the First Amendment. Speech advocating the forcible destruction of democratic government or the frustration of such government through law violation has no value in a system whose basic premise is democratic rule. Speech of that nature, moreover, poses obvious dangers. If it is allowed to proliferate and social or political crisis comes once more to the nation, so that there really is a likelihood of imminent lawless action, it will be too late for law. Aside from that possibility, it is well known that such speech has been and is used to recruit persons for underground activity, including espionage, and for terrorist activity. More dangerous is the lesson that our form of government is not inherently superior to any other. Like pornography, it is held to be a matter of taste. A nation which comes to believe nothing about its fundamental principles of organization is unlikely to show determination in defending them. It is unlikely to display high political morale or cohesiveness. It may not have a very high chance of survival either.[58]

The mere toleration of speech such as was involved in Hess, Bork insists, is a threat to the survival of the nation, regardless of whether it in fact leads to any unlawful activity. In 1987 Judge Bork reiterated his objection to Brandenburg.[59]

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58 Id. at 21-22.

59 Brandenburg liberalized the "clear and present danger" standard of Dennis v. United States 341 U.S. 494 (1951). Brandenburg and Dennis effectively repudiated earlier decisions in which Justice Sanford, over the dissents of Justices Holmes and Brandeis, afforded substantially less constitutional protection to free speech. Gitlow v. New York 268 U.S. 652 (1925); Whitney v. California 274 U.S. 357 (1927).

In 1987 Judge Bork commented:

The critical practical impact of Brandenburg and Hess is with regard to determining what type of speech may constitutionally be prosecuted as advocacy of "law violation."[60] Judge Bork places substantial emphasis on the question. In his 1979 Michigan speech he spelled out the statement in Hess which, he urged, had been wrongly protected by the First Amendment.[61] In a 1987 speech Judge Bork noted that Brandenburg's restriction on what types of speech could be prosecuted as "advocacy of law violation" had in the late 1960's and early 1970's been of major importance. In discussing the successful court martial of Dr.

> [T]he clear and present danger test has been abandoned here for some time with the Brandenburg... decision, at least the clear and present danger tests the way Holmes meant it, I think.
>
> Actually, in those famous decisions, I thought the majority -- I think it was Sanford, Justice Sanford -- had a rather better logical argument than either Holmes or Brand[eis].... I don't think the clear and present danger test was an adequate test, no.
>
> Worldnet Interview, June 10, 1987, pp.30-31.

60 With the waning of the McCarthy era, prosecutions for subversion have become largely a historical curiosity; the far right has abandoned the search for communists to pursue newer perceived dangers, and among the far left, interest in Marxist-Leninist rhetoric appears to be insignificant.

61 Id. at 21. Judge Bork remarked, with regard to Brandenburg v. Ohio, "Brandenburg's conviction could have been reversed on other grounds." What these grounds were, and whether reversal on that basis was in Judge Bork's view required or merely conceivable, are unclear.

Howard Levy, an Army physician who opposed the war in Vietnam,[62] Bork observed:

> Captain Levy.... stated to enlisted personnel that the United States was wrong to be in Vietnam, that he would disobey any order to go, that black soldiers, being discriminated against in America, should refuse to go, and that Special Forces personnel were liars, thieves, killers of peasants, and murderers of women and children.
>
> Catatonic sentiments of this sort were at the time being freely expressed in our better universities, as well as elsewhere, but under the Supreme Court's decision in Brandenburg v. Ohio, could not be inhibited or punished in any way.[63]

To understand the type of speech that Judge Bork believes should be unprotected by the First Amendment, and thus be subject to criminal prosecution, it is helpful to review the circumstances of the Hess case.

> The events leading to Hess' conviction began with an antiwar demonstration on the campus of Indiana University. In the course of the demonstration, approximately 100 to 150 of the demonstrators moved onto a public street and blocked the passage of vehicles. When the demonstrators did not respond to verbal directions from the sheriff to clear the street, the sheriff and his deputies began walking up the street, and the demonstrators in their path moved to the curbs on either side, joining a large number of spectators

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62 See Parker v. Levy, 417 U.S. 733 (1974).

63 Speech, Judge Advocate General's School, May 4, 1984, pp.5-6.

> who had gathered. Hess was standing off the street as the sheriff passed him. The sheriff heard Hess utter the word "fuck" in what he later described as a loud voice and immediately arrested him on the disorderly conduct charge. It was later stipulated that what appellant had said was "We'll take the fucking street later," or "We'll take the fucking street again." Two witnesses who were in the immediate vicinity testified, apparently without contradiction... that Hess did not appear to be exhorting the crowd to go back into the street, that he was facing the crowd and not the street when he uttered the statement, that his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the people in the area.

414 U.S. at 106. The sheriff, evidently a man of great sensitivity, testified that he was "offended" by Hess' language; two female witnesses testified they were not. 414 U.S. at 108, fn.1.

Hess' statement, the text of which Judge Bork quoted verbatim in his commentary on the Hess decision, may fairly be considered a paradigm of the type of speech which on Judge Bork's view falls outside the protection of the First Amendment, and which, if tolerated, poses a threat to the nation. The facts of the Hess case, we believe, demonstrate the danger in Judge Bork's position and the importance of the decision in Hess and Brandenburg defining far more narrowly the types of statements which may constitutionally provide a basis for criminal prosecution. First, it is far from clear that Hess was exhorting

the crowd at all, rather than merely venting his own displeasure at the action of the police. Second, if the key portion of the remark was the word "later," it might, as the Supreme Court noted, have been intended as "counsel for present moderation," 414 U.S. at 108, urging the crowd to accept for the time being the direction of the police to clear the street. Third, it is not all certain that Hess' remark, even if intended as a call for future action by the crowd, was a call for "unlawful" action. "Take the...street" is not a phrase of any precise or generally agreed meaning; it could clearly have been intended, or understood, as referring to lawful, constitutionally protected action. Peaceful demonstrations, like parades, frequently involve, with the concurrence of local authorities, the temporary closing of roads.

Similarly, the anti-war sentiments which Judge Bork, with evident regret, noted enjoyed constitutional protection under Brandenburg, bore only an indirect and unpredictable relationship to any possible unlawful conduct. The four "catatonic" remarks protected by Brandenburg were as follows:

> "[T]he United States was wrong to be in Vietnam."
>
> "Special Forces personnel were liars, thieves, killers of peasants, and murderers of women and children."
>
> "[The speaker] would disobey any order to go."

"Black soldiers, being discriminated against in America, should refuse to go."

The first two "catatonic sentiments" were criticism of government policies which then were the subject of a heated and enormously important public debate; if criticism of American involvement in Vietnam could be banned on the grounds that it was intended or likely to provoke unlawful action, discussion of such public controversies would often be impossible. The third type of remark was a prediction that the speaker would, if in the armed forces and assigned to serve in Vietnam, refuse to obey that order; laying aside the existence a decade ago of a bona fide dispute as to the legality of the war, and thus of such orders, one individual's prediction that he may violate the law often carries with it no substantial likelihood of inducing similar conduct by others. Only the last statement -- one which was far less common 20 years ago than the first three -- could be described with any degree of certainty as intended as a form of advocacy.

(6) Kingsley Corp v. Regents of University of New York. In Kingsley v. Regents of University of New York, 360 U.S. 684 (1959), the Supreme Court unanimously held unconstitutional New York's attempt to ban a movie for advocating ideas to which the state objected. The movie in question was a film version of D.H. Lawrence's Lady Chatterley's Lover; state officials did not contend the film was obscene, and apparently only three isolated

scenes depicted or suggested sexual activity. 360 U.S. at 685. The movie was banned, according to the Regents, because "the whole theme of this motion picture... is the presentation of adultery as a desirable, acceptable and proper pattern of behavior." 360 U.S. at 685. The officials acted under a statute which required commercial movie theaters to exhibit only licensed motion pictures, and which authorized denial of a license to any film "which expressly or impliedly presents" "acts of sexual immorality" "as desirable, acceptable, or proper patterns of behavior." 360 U.S. at 685.

In overturning the state's action, the Supreme Court explained:

> [I]t is not suggested that the film would itself operate as an incitement to illegal action. Rather, the New York Court of Appeals tells us the relevant portion of the New York...Law requires the denial of a license to any motion picture which approvingly portrays an adulterous relationship, quite without reference to the manner of its portrayal.
>
> What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea -- that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas.... Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realism of ideas it protects expression which is eloquent no less than

that which is convincing.

360 U.S. at 688-89.

Where no advocacy of unlawful conduct is involved, the Supreme Court has consistently held that the government may not prohibit speech because officials, or the public, disagree with the ideas involved. Justice Powell noted in Gertz v. Welch, 418 U.S. 323, 339-40 (1974):

> We began with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of ideas.

Justice Powell quoted Thomas Jefferson's first Inaugural Address:

> If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason left us free to combat it.

418 U.S. at 340 n.8.

Judge Bork, as some members of the Supreme Court, has frequently expressed criticism of the Court's decisions regarding obscenity. The argument advanced by Judge Bork, however, reaches

far beyond the relatively limited area of disagreement within the Supreme Court. Judge Bork regards movies and other materials relating to sexual activity as a legitimate subject of government regulation precisely because those materials are likely to alter the ideas of the audience about sexual morality and activities:

> [C]ommunities should be allowed to have a public morality and to recognize.... moral harms....
>
> [T]he courts tend to assume that it is not a problem the community is permitted to address if willing adults indulge a taste for pornography in a theater whose outside advertising does not offend the "squeamish." The assumption seems wrong. The consequences of such "private" indulgence may have public consequences far more unpleasant than industrial pollution. The attitudes, tastes, and moral values inculcated do not stay behind in the theater.[64]

The very purpose of the movie ban condemned in Kingsley, of course, was to prohibit the showing of a film that would inculcate moral ideas and values to which the government objected.

If, as Judge Bork has suggested with regard to sexual activity, the government can punish speech which advocates, or inculcates, objectionable "attitudes, tasks, and moral values," about sexual conduct, it would seem to follow that the government

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64 Speech, Attorney General's Conference, June 14, 1986. p.8.

could punish speech likely to result in "undesirable" moral attitudes regarding any other subject. Judge Bork has drawn precisely that conclusion:

> The Supreme Court tends to assume that it is not a problem if willing adults indulge a taste for pornography in a theater whose outside advertising does not offend the "squeamish." The assumption is wrong.... A change in moral environment -- in social attitudes toward sex, marriage, duties toward children, and the like -- may as surely be felt as a harm as the possibility of physical violence. The Court has never explained why what the public feels to be a harm may not be counted as one.[65]

In Judge Bork's view, the government is entitled to regard certain "attitudes" towards marriage or raising children as morally harmful, and to protect against that moral harm by punishing the sale or distribution of books or other materials likely to inculcate, by force of example or direct advocacy, those injurious attitudes. A community which enjoyed the authority to suppress material advocating or inculcating the morally harmful idea about marriage that wives should not engage in adultery, could with equal authority decide that it was morally harmful for wives to read books or see movies suggesting they could deny their husbands sex on demand, or that they should refuse to accept orders from their spouses.

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[65] Speech, University of Michigan, February 5, 1979, p.15 (emphasis added).

Although the passages quoted above deal with control of ideas causing moral harms, Judge Bork has indicated that the government could constitutionally seek to prevent the airing of public policy ideas which, although not proposing unlawful activity, were potentially harmful to the nation. Some ideas, he suggests, could and should be kept outside the bounds of permissible public discourse. Judge Bork quotes with approval an argument by John Stuart Mill that discussion of certain ideas would be intolerably harmful to the nation:

> In all political societies which have had a durable existence, there has been some fixed point; something which men should agree in holding sacred; which it might or might not be lawful to contest in theory, but which no one could either fear or hope to see shaken in practice; which, in short (except perhaps during some temporary crisis), was in the common estimation placed above <u>discussion</u>. And the necessity of this may easily be made evident. A state never is, nor, until mankind are vastly improved, can hope to be, for any long time exempt from internal dissension; for there neither is nor has ever been any state of society in which collisions did not occur between the immediate interests and passions of powerful sections of the people. What, then, enables society to weather these storms, and pass through turbulent times without any permanent weakening of the ties which hold it together? Precisely this--that however important the interests about which men fall out, the conflict does not affect the fundamental principles of the system of social union which happen to exist; nor threaten large portions of the community with the subversion of that on which they have built their calculations, and with which their hopes and aims have become identified. But when the questioning of these fundamental principles in (not an occasional disease, but) the

> habitual condition of the body politic; and when all the violent animosities are called forth, which spring naturally from such a situation, the state is virtually in a position of civil war; and can never long remain free from it in act and fact.[66]

Bork goes on to suggest some ideas which should not be tolerated in public discourse:

> [Alexander] Bickel wrote: "If in the long run the belief, let us say, in genocide is destined to be accepted by the dominant forces of the community, the only meaning of free speech is that it should be given its chance and have its way. Do we believe that? Do we accept it?" Bickel went on to ask "whether the best test of the idea of proletarian dictatorship, or segregation, or genocide is really the marketplace, whether our experience has not taught us that even such ideas can get themselves accepted there..." To engage in the debate is to legitimate the idea, and, as Bickel remarked, "Where nothing is unspeakable, nothing is undoable."[67]

Bork's views run counter to that of Thomas Jefferson and to the American experience. History has sustained Thomas Jefferson's view that the strength of the republic lies in the public's ability to reject such deplorable doctrines on their merits, not on any governmental authority to suppress discussion of those

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66 Speech, University of Michigan, February 5, 1979, pp. 22-23. Judge Bork, who generally disagrees with Mill, commented that the quoted passage was written by Mill "on one of his better days." (Id. at 22).

67 Id. at 24.

ideas.

(7) Cohen v California, 403 U.S. 15 (1971). The defendant in this action was convicted of disorderly conduct, and sentenced to jail, for wearing in public a jacket bearing the words "Fuck the Draft." "The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the Draft." 403 U.S at 16. The Supreme Court overturned the conviction, holding that the words on the jacket were constitutionally protected free speech.

While expressing distaste for the word involved, the Court concluded in an opinion written by Justice Harlan that, were it to hold that this word was sufficiently offensive to fall outside the First Amendment, it would be required to pass on the constitutional status of each of the wide variety of vulgar or tasteless epithets in the English language:

> How is one to distinguish this from any other offensive word? Surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgement below.

403 U.S. at 25. Because of the widespread use of occasionally vulgar language, the power to prosecute such conduct would convey

discretion to punish a wide variety of speakers:

> [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.

403 U.S. at 26. The majority also reasoned that the inclusion of such language in a public statement, such as Cohen's expression of opposition to the draft, might play some part in the speaker's message:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their motive as then cognitive force. We cannot sanction the view that the constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking may often be the more important element of the overall message so right to be communicated... Indeed, as Justice Frankfurter has said, "One of the prerogatives of American citizenship is the right to criticize public men and measures--and that means not only informed and responsible criticism but freedom to speak foolishly and without moderation."

403 U.S. at 26. The words "Repeal the Selective Service Act" simply would not convey the same degree and type of hostility to

the draft that was announced by the slogan on Cohen's jacket.

Judge Bork has repeatedly criticized the decision in Cohen. In 1983, a year after becoming a federal judge, he argued in a speech at West Point:

> A State attempted to apply its obscenity statute to a public display of an obscene word. The Supreme Court majority struck down the conviction on the grounds that regulation is a slippery slope and that moral relativism is a constitutional command. The opinion said "the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?... The answer... is, by the common sense of the community.[68]

On this view, the permissible language that might be used in materials commenting on public affairs -- be they newspapers, books, bumper stickers, or buttons -- would vary from city to city. The terminology to which Judge Bork objected in Cohen is routinely used in a wide variety of well established publications; it is probably impossible to find a recent edition of the Village Voice, for example, that could legally sold in

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68 Speech, West Point, April 9, 1985, pp. 6-7; Judge Bork repeated this statement in a speech at Aspen, Colorado, August 13, 1985, p. 6. See Francis Boyer Lecture, American Enterprise Institute, December 6, 1984, p. 3-4 (argues result of Cohen rationale is that "community's moral and aesthetic judgements are reduced to questions of style and those are then said to be privatized by the Constitution.") Judge Bork's description of Cohen as having been brought under an obscenity statute is factually incorrect.

California if Cohen were overturned.

In another speech Judge Bork not only defended the constitutionally of the conviction in Cohen, but agreed that Mr. Cohen's jacket posed a grave threat to the democratic process:

> [Cohen] might better have been decided the other way on the ground of public offensiveness alone. That offensiveness had nothing to do with the ideas expressed, if any ideas can be said to have been expressed at all. But there are other, perhaps weightier reasons, why the Court should not interfere in community efforts to control such language. If the First Amendment relates to the health of our political processes, then, far from protecting such speech, it offers additional reason for its suppression.
>
> The claim is probably unconventional, so I will say a word or two about it. George Orwell noted the connection between politics and language. They interact and each affects the quality of the other. He wrote of meaningless language as reducing the speaker and the listener's awareness and said "this reduced state of consciousness, if not indispensable, is at any rate favorable to political conformity." The effect is not one way: "But if thought corrupts language, language can also corrupt thought." And he said, writing in 1946, "one ought to recognize that the present political chaos is connected with the decay of language, and that one can probably bring about some improvement by starting at the verbal end." Orwell was talking about ugly, inaccurate, and slovenly language that impeded thought, not about anything remotely resembling the obscenities that have since debased public discourse. This language the Supreme Court dealt with in [Cohen and its progeny] cases, is not merely the language of inaccurate or slovenly thought. It is also the language of mindless assault. Alexander Bickel reminded

> us that "There is such a thing as verbal violence, a kind of cursing, assaultive speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated." He also said that "a marketplace without rules of civil discourse is no marketplace of ideas, but a bullring." Use of such language reduces or eliminates meaning, and there is no reason whatever for the First Amendment to protect it.[69]

Judge Bork's remark illustrates how vital it is that members of the Supreme Court, in enforcing the First Amendment, have a sensible understanding of the realities of public discourse. It is nonsense to suggest that either the First Amendment or the nation's political process were threatened by Mr. Cohen's jacket, or that they would have been imperiled by a million such jackets. The American people, and our political system, are made of much sturdier stuff.

In 1984, in the midst of the national political campaign, the Vice-President of the United States announced on national television that he had "kicked some ass" during an earlier debate; shortly thereafter the Vice President's wife referred to the Democratic Vice-Presidential nominee with an incomplete rhyme clearly intended to characterize her husband's opponent as a "bitch." If Judge Bork's view of the political process were correct, their two remarks would have brought an end to democracy

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69 Speech, University of Michigan, February 5, 1979, pp. 18-19.

as we know it. Nothing of the sort happened, of course, and happily no community sought to vindicate its "moral values" by prosecuting either speaker. Less than a year later Judge Bork, although making no mention of the language used in the 1984 national elections, reiterated his insistence that Mr. Cohen was properly convicted of criminal conduct.[70]

(8) Miller v. California and Kois v. Wisconsin. The Supreme Court has repeatedly held that the First Amendment does not protect obscenity; the central question in this area of the law is what constitutes obscenity. The reigning definition is set forth in Chief Justice Burger's decision in Miller v. California, 413 U.S. 15 (1973). Under Miller, no book, movie, or other material can be deemed obscene unless "the work, taken as a whole, lacks serious literary, artistic, political or scientific value." 413 U.S. at 25. Materials with such value are protected by the First Amendment even if it also deals with sexual relations. The Supreme Court observed in 1957, in a passage cited in Miller,

> [S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious force in human life, has

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[70] Speech, Aspen, Colorado, August 13, 1985, p.8.

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> indisputably been a subject of absorbing interest to mankind throughout the ages; it is one of the vital problems of human interest and public concern.

Roth v. United States, 354 U.S. 476, 487 (1957).

The constitutional protection recognized by Roth and Miller for materials of literary, artistic, political and scientific value was enforced in Kois v. Wisconsin, 408 U.S. 229 (1972). In Kois the Supreme Court unanimously overturned the conviction of an underground newspaper editor sentenced to two years in jail because of articles printed in that paper. The first article described and criticized the arrest of a photographer and the seizure of certain allegedly obscene photographs; "[t]wo relatively small pictures, showing a nude man and nude woman embracing in a sitting position, accompanied the article and were described in the article as 'similar' to those seized from the photographer." 408 U.S. at 230. The Supreme Court held that the state could not forbid or punish publication of the photographs because they were part of a legitimate news story:

> [I]f these pictures were indeed similar to the one seized -- and we do not understand the State to contend differently -- they are relevant to the theme of the article. We find it unnecessary to consider whether the State could constitutionally prohibit the dissemination of the pictures by themselves, because in the context in which they appeared in the newspaper they were rationally related to an article that itself was clearly entitled to protection under the First

Amendment.

403 U.S. at 231. The Court also overturned a second conviction that had been based on an edition of the paper which included, as part of a two page spread of 11 poems, a single poem that was "an undisguisedly frank, play-by-play account of the author's recollection of sexual intercourse." 402 U.S. at 231. The court concluded that, despite its subject matter, "considering the poem's content and its placement amid a selection of poems in the interior of a newspaper, we believe that it bears some of the earmarks of an attempt at serious art." 408 U.S. at 231.

In 1979 Judge Bork objected to two aspects of the Miller standard:

> The notion that expression must be protected if, in addition to pornography or obscenity, it contains an idea is equally insupportable. The idea may be expressed in innumerable other ways. Just as the First Amendment has been held to allow restrictions as to time, place, and manner, it hardly seems dangerous to say that ideas may be expressed in many ways, but not in a context of the obscene.[71]

Judge Bork recognized that Miller had actually broadened the definition of what constituted obscenity unprotected by the Constitution, but still found Miller objectionable:

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[71] Speech, University of Michigan, February 5, 1979, p. 15.

> [E]ven that test appears to have made it impossible for communities to control the torrent of pornography which earlier decisions had loosed [sic] upon them. Perhaps that is because there is always a professor around, and a judge to believe him (which reminds one rather of P.T. Barnum's dictum), that the purest pornography is actually a profound parable about the decline of capitalism.[72]

As the first quotation indicates, Judge Bork evidently believes that the political, scientific, literary or artistic importance of a book, movie or other material should not be evaluated, in the terms of Miller, "as a whole;" if any portion of such a work would, viewed in isolation, be obscene, then publication of the work may be punished as obscenity. A prosecutor may scrutinize a book on a line by line basis, and a writer or publisher seeking to avoid criminal punishment must purge publication of any passage or photograph that depicts or refers to sexual conduct in an impermissible manner.

(9) Buckley v. Valeo, 424 U.S. 1 (1974). This decision dealt with the constitutionality of various 1974 amendments to the Federal Election Campaign Act. While overturning certain portions of that statute, the Court upheld four critical provisions:

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72 Id. at 16.

Section 608(b)	Establishes a $1000 ceiling on contributions by an individual to a particular candidate.
Section 608(b)(2)	Establishes a $5000 ceiling on contributions by a political action committee to a single candidate.
Section 608(b)(3)	Establishes an overall $25,000 annual restriction on total contributions by an individual.
Section 431	Requires public disclosures regarding the identity of individuals making political contributions of more than $10.

424 U.S. at 23-28, 60-85. Justice Powell joined the majority opinion upholding these provisions.

The majority concluded that the limitations on campaign contributions were appropriate as a method of preventing the sort of abuses which occurred during the 1974 Nixon reelection campaign.

> It is unnecessary to look beyond the Act's primary purpose -- to limit the actuality and appearance of corruption resulting from large individual financial contributions -- in order to find a constitutional justification for the $1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign.... To the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of representative democracy is undermined. Although the scope of such pernicious

> practices can never be reliably ascertained, the deeply disturbing example surfacing after the 1972 election demonstrates that the problem is not an illusory one.

424 U.S. at 26-27. The Court concluded that the contribution disclosure rules served a variety of important purposes:

> First, disclosure...aid[s] the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive....
>
> Second, disclosure requirements deter actual corruption by exposing large contributions and expenditures to the light of publicity.... A public armed with information about a candidate's most generous supporters is better able to detect any post-election favors that may be given in return....
>
> Third,... recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations....

424 U.S. at 66-68.

In 1978 Judge Bork criticized both the policy of the Federal Election Campaign Act and the decision in Buckley:

> Periods of sin and excess are commonly followed by spasms of remorse and moralistic

> overreaction.... We have, as atonement for illegalities in fund raising for the 1972 campaign, the Federal Election Campaign Act, which limits political expression and deforms the political process. The Supreme Court held that parts of this act violate the First Amendment and probably should have held that all of it does.[73]

In a 1979 speech Judge Bork suggested that Buckley v. Valeo, insofar as it upheld the Federal Election Campaign Act, was possibly "the most important First Amendment case in our history."[74] Again Judge Bork argued that the Supreme Court's concern about political corruption was quite excessive:

> [T]he Court found the Act's primary purpose sufficient to sustain it -- to limit corruption and the appearance of corruption resulting from large individual financial contributions. Those are very strange reasons. The limit of $1,000 now worth $600 or $700 because of inflation, is impossibly severe. In a presidential election, for example, it is impossible to imagine that anything could be bought for a hundred times that sum. It is much too low a figure even for elections for Senate and House seats.[75]

The campaign limits were unreasonable, Judge Bork urged, because it was "impossible to imagine" that a contribution of $100,000 could affect the vote of a member of Congress; the officials of

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[73] Robert Bork, "'Reforming' Foreign Intelligence," Wall Street Journal, March 9, 1978.

[74] Speech, University of Michigan, 1979, pp.3, 29.

[75] Id. at 27.

many Political Action Committees evidently do not share Judge Bork's views regarding the likelihood that members of the House and Senate would be influenced by substantial contributions. Judge Bork also suggested that a major impact of the statute would be to reduce the political influence of corporations; indeed, he suggested, one of the real purposes of the legislation may have been to increase the political power of labor unions and journalists:

> The statute and the decision [in Buckley] have shifted political power in America toward those with leisure to engage in political activity, toward labor unions who have both manpower to offer and are permitted unlimited political activity in circumstances that make them far more effective than corporate activity, toward journalists and those with free access to the media, toward candidates with great personal wealth, and toward incumbents who have thoughtfully provided themselves with political resources at governmental expense. Many of these shifts were intended by the groups favored.[76]

The very existence of the Federal Election Commission, Judge Bork warned, was "ominous," since the Commission was in a position to promulgate "seemingly technical amendments" to its regulations that could "determine the outcome of elections and alter the balance of political forces in the nation."[77]

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[76] Id. at 28.

[77] Id. at 29.

In 1979 Judge Bork again argued that Buckley posed a serious threat to freedom of the press:

> Much of the press was quite receptive to the Federal Election Campaign Act and, as I recall, no amicus briefs were filed by the press in support of the constitutional challenge to that act. As a result, we now have a federal commission in place regulating amounts of political speech, speech which is at the core of the First Amendment. Moreover, we have a law which permits extensive use of the media for political campaigns and political expression only by candidates with great personal wealth, and by journalists. We have arrived at the obviously unjust result that a man may not express himself about a political campaign through a political advertisement in a newspaper, but may say what he pleases, as often as he pleases, if he owns the newspaper.
>
> That is an arbitrary and unjust distinction, and the law may one day erase it. Given the tendency of our times to level down rather than up, the distinction may be eliminated by restraining the press. I think it is at least arguable, therefore that the result in Buckley v. Valeo, the case that created this distinction, is potentially far more dangerous to the press than either Branzburg or Farber.[78]

In a 1986 speech, four years after becoming a federal judge, Judge Bork criticized the Supreme Court's decision in Buckley for having been unduly concerned about the problem of political

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78 Robert Bork, "The First Amendment Does Not Give Greater Freedom the Press than to Speech," The Center Magazine, March/April 1979, p. 34. (Branzburg v. Haves and Farber were decisions holding that reporters have no constitutional rights to refuse to identify their sources.)

corruption:

> I was struck... in Buckley v. Valeo at the almost lighthearted way in which the Court allowed really heavy regulation of political speech, and particularly heavy regulation of political contributions, which it didn't seem to think important.... [T]he political corruption rationale is very odd and the Court is very soft on it, because the amounts that are regulated are so far below anything that could be expected to result in purchasing anybody's vote on an issue. And indeed the Court justified what it did by saying it had to uphold regulations on contributions on the theory it had to prevent the appearance of corruption, which is an odd thing. If there are some people who are so suspicious that they think a contribution over $1,000 somehow does something to a Presidential candidate, we have allowed a very weak rationale to control what is symbolic and important political speech. It's something akin to the heckler's veto; if there are people out there who are suspicious, the speech or the political conduct can be regulated.
>
> But in any event what I really wanted to say is that I think the Court has wavered in its devotion to the idea of free political processes. I think Buckley v. Valdejc [sic] was not a major victory for those of us who think that -- in fact it was a major defeat -- for those of [us] who think that political processes are the core of the First Amendment and should be left wide open.[79]

Judge Bork reiterated his conviction that only contributions of a size far higher than the statutory limits would be likely to improperly influence public cfficials:

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79 Speech, Federalist Society, Stanford University, March 7, 1986, pp.5-7.

> [I]f we're talking about prophylactic rules because contributions of a certain size are likely to be bribery, I would think, one, that it is a proposition that is almost always untrue no matter what size range you pick, and secondly, that you would have to choose a size range if there was any, much, much, higher than anything contemplated by current law.[80]

Judge Bork expressed confidence that permitting unlimited contributions by rich donors would not unfairly tilt the political process:

> Given the disagreement among people in our society with money there is no danger that any major, even minor, point of view, is going to go unfunded, in fact, as we know some very wealthy people fund some very radical causes.[81]

Judge Bork warned, however, that because of the statutory requirement that contributions be disclosed,

> many people were effectively excluded from the political process. Anybody who didn't want it known -- a university president, somebody of that sort -- that he supported a particular side was really forbidden from contributing much of anything without having that exposed.[82]

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80 Id. at 57.

81 Id. at 58.

82 Id. at 6.

In evaluating Judge Bork's views regarding Buckley, it may be helpful to review the specific abuses of the 1972 campaign which led to the 1974 legislation, and which were alluded to in the Supreme Court's opinion.

B. FREE EXERCISE OF RELIGION

(1) Wisconsin v. Yoder, 406 U.S. 205 (1972). In Wisconsin v. Yoder the Supreme Court ruled unanimously that a state could not require Amish children to attend public high schools, where such attendance violated the fundamental beliefs of the children and their parents.[83] The daily life and religious practices of the Old Order Amish stem from their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to the world...." Old Order Amish communities are characterized by a fundamental belief that salvation requires life in church community separate from the world and worldly influence. The precepts of the faith pervade and determine the entire mode of life of its adherents. Their conduct is regulated in great detail by the rules of the church community. Amish beliefs require members of the community to make their living by farming or closely related activities, and to avoid most of the trappings of modern society, including telephones, televisions, radios and automobiles.

The daily activities of adolescent Amish children are an essential part of their religious training and faith.

During this period, the children must acquire

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83 Justice Douglas disagreed with the majority's view as to the resolution of a case in which a child and his or her parents had different beliefs. 406 U.S. at 241-49.

> attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife.... [A]t this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism.

406 U.S. at 211.

Against this background, the Supreme Court concluded that compelling Amish children to attend public high schools might well lead to destruction of the Old Order Amish church community. Chief Justice Burger explained:

> [The] Amish... object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness" rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; separation from, rather than integration contemporarily worldly society.

406 U.S. at 210-11. Compulsory school attendance, "the record shows... carries with it a very real threat of undermining the Amish community and religious practice as they exist today." 406

U.S. at 218. In the face of such laws, the Amish were required either to accept the destruction of their faith or "be forced to migrate to some other and more tolerant region." Id.

Since becoming a federal judge, Judge Bork has repeatedly criticized the Supreme Court's interpretation of the Free Exercise Clause for its "enormous breadth and severity."[84] Judge Bork has singled out Wisconsin v. Yoder for specific criticism:[85]

> The free exercise clause has received... [an] expansive interpretation. The rule is that government regulations of conduct will be held to violate the clause if the effect conflicts with a person's religious beliefs, unless the government can show an important, perhaps compelling, governmental interest that cannot be achieved in some other way. We are talking about regulations of conduct that are not aimed at religion but happen to touch it. Let me illustrate that point and also the fact that broad interpretations of the two religious clauses have brought the two into conflict.
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> Sometimes government is required to make exemptions from its laws under the free exercise clause that, had government made the same exemptions voluntarily, would have been

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84 Speech, Canisius College, October 8, 1985, p.3; see also Speech, University of California, Los Angeles, April 24, 1985, p.7 (interpretation of Free Exercise Clause unduly "expansive"); Speech, University of California, Berkeley, April 29, 1985, p.5 (interpretation of Free Exercise Clause unduly "expansive"); Speech, Brookings Institution, September 12, 1985, p.6 (interpretation of the Free Exercise Clause "overly expansive").

85 Wisconsin v. Yoder is also cited as an example of misinterpretation of the Free Exercise Clause in Speech, Canisius College, October 8, 1985, p.3.

> ruled an impermissible aid to religion and hence a violation of the establishment clause. The classic example... is Wisconsin v. Yoder. The state had the usual compulsory education law requiring attendance to the age of sixteen.... It was challenged by Amish parents who said it violated their religious tenets to send their children to public school beyond the eighth grade. The Supreme Court ruled for the Amish under the free exercise clause. This, in substance, required Wisconsin to give an exemption to one religious group from its general laws. Had Wisconsin attempted to grant the exemption voluntarily by statute, there is little doubt under existing doctrine that the exemption could have been successfully challenged as an establishment of religion.[86]

The Supreme Court has repeatedly observed that the accommodations required by the Free Exercise Clause would not violate the Establishment Clause if adopted voluntarily by government officials. Hobbie v. Unemployment Compensation Appeals Commission 94 L.Ed. 2d 190, 200 n.10 (1987).

Judge Bork has suggested that the Free Exercise Clause might better have been read "simply to prohibit laws that directly and intentionally penalize religious observance."[87] If the Supreme Court were to interpret the Free Exercise Clause in that manner, it would be compelled to overrule the leading Free Exercise cases of the last 24 years. See e.g., Hobbie v. Unemployment Appeals Commission, (facially neutral state law unconstitutionally

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86 Speech, University of Chicago, November 13 1984, pp.7-8.

87 Id. at 2; Speech, Brookings Institute, September 12, 1985, p.1.

burdened free exercise right of Seventh-Day Adventist); Thomas v. Review Board, 450 U.S. 707 (1981), (facially neutral state law unconstitutionally burdened free exercise right of Jehovah's Witness); Sherbert v. Verner, 374 U.S. 398 (1963), (facially neutral state law unconstitutionally burdened free exercise right of Seventh-Day Adventist).

C. ESTABLISHMENT OF RELIGION

(1) Aguilar v. Felton, 87 L.Ed. 2d 290 (1985). Aguilar v. Felton, and a companion case, Grand Rapids School District v. Ball, 87 L.Ed. 2d 267 (1985), declared invalid three types of government assistance to parochial schools: (a) the use of government funds to pay the salaries of parochial school teachers when conducting in those schools, but after the end of the regular school day, classes on a variety of academic and non-academic subjects, (b) the use of government funds to pay the salaries of teachers providing instruction in parochial school during the regular school day on certain "remedial" and "enrichment" subjects including mathematics, reading, art and music (c) the use of government funds to pay the salaries of regular public school employees who provide remedial instruction and guidance services to parochial students on the premises of parochial schools.

The majority opinion in Grand Rapids, which Justice Powell joined, applied three traditional criteria for evaluating whether a government practice or program violates the Establishment Clause:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleamed from our cases. First, the statute must have a secular legislative purpose; second, its

> principal must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion."

Grand Rapids School District v. Ball, 87 L.Ed. 2d at 276. As recently as 1983 the entire Court accepted this three-part test. Mueller v. Allen, 463 U.S. 388, 394 (1983). In 1985, however, Justice Rehnquist repudiated the whole body of Establishment Clause cases decided since 1947, and proposed interpreting the Clause to permit direct government assistance to religious organizations, for the express purpose of fostering religion, so long as the assistance was provided to all sects on a non-discriminatory basis. Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

Justice Powell joined the majority opinion in Wallace v. Jaffree, and wrote a concurring opinion:

> to respond to criticism of the three-pronged test.... It is the only coherent test a majority of the Court has ever adopted. Only once since [it was adopted]... have we addressed an Establishment Clause issue without resort to [the] three-pronged test.

472 U.S. at 63.

> [T]he test has been applied consistently in Establishment Clause cases since it was adopted in 1972. In a word, it has been the law. Respect for stare decisis should

require us to follow [it].

472 U.S. at 63 n.3. Justice Powell joined the majority opinions in both Aguilar and Grand Rapids, and explained his reasons for doing so in an additional concurring opinion:

> [T]he type of aid provided...amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require...[B]y directly assuming part of the parochial school's education function, the effect of the...aid is "inevitably...to subsidize and advance the religious mission of [the] sectarian schools"...even though the program provides that only secular subjects will be taught...[T]he secular education these schools provides goes "hand in hand" with the religious mission that is the reason for the school's existence.

87 L.Ed.2d at 303.

In 1984 and 1985 Judge Bork denounced both Aguilar and the three-part standard, and advocated adoption of Justice Rehnquist's view that the Establishment Clause permits any assistance to religious organizations which is non-discriminatory. That three part standard, Judge Bork has objected, was "obviously designed to erase all traces of religion in governmental action... and the modern law largely accomplishes

that."[88] "The deliberate and thorough-going exclusion of religion is seen as an affront and has itself become the cause of great divisiveness."[89] If religion were not restored to public life, Bork warned, democracy itself might be in jeopardy.

> There may be in man an ineradicable longing for the transcendent. If religion is officially removed from public celebration, other transcendent principles, some of them very ugly indeed, may replace them.... The public square will not remain naked. If religion departs, some other principle will arrive. The way is prepared for the loss of democratic legitimacy.[90]

The transcendent ideology which replaces public religion could well be, Bork suggests, "political or racial."[91]

According to Judge Bork, the first of the three standards in Aguilar,

> that government action is unconstitutional if it has a religious purpose... appears to be inconsistent with the historical practice that suggests the intended meaning of the establishment clause. From the beginning, Presidents, at the request of Congress, have issued Thanksgiving Day proclamations that were explicitly religious. Jefferson alone

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88 Speech, University of Chicago, November 13, 1984, p.2; Speech, Brookings Institution, September 12, 1985, p.2.

89 Speech, University of Chicago, November 13, 1984, p.16.

90 Id. at 17.

91 Speech, Brookings Institution, September 12, 1985, p.13.

> refused. There were chaplains in the Continental Congress. The First Congress under the Constitution proposed the first amendment four days after providing for a chaplain for each House. That Congress also enacted a law authorizing the President, "by and with the advice and consent of the Senate," to appoint a paid chaplain for the military establishment.
>
> These may seem relatively minor actions but, in the context of a federal government that had very few functions that might have touched upon matters of religion, they seem not so minor after all. There is other evidence that tends to bolster...[the] claim that the first amendment was not intended to prohibit the nondiscriminatory advancement of religion, so long as religious belief was not made a requirement in any way.[92]

The more plausible reading of the Establishment Clause, Judge Bork suggests, is "merely to preclude the recognition of an official church, or to prevent discriminatory aid to one or a few religions."[93] Such a change in the law, Judge Bork argues, would have the salutory effect of restoring religion as a part of public life:

> A relaxation of current rigidly secularist doctrine would in the first place permit some sensible things to be done. Not much would be endangered if a case like Aguilar went the other way and public school teachers were permitted to teach remedial reading to that portion of the educationally deprived children who attend religious schools. I

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92 Speech, University of Chicago, November 13, 1984, pp.5-6.

93 Id. at 1-2; Speech, Brookings Institution, September 12, 1985, p.1.

[clause] rules has been immeasurably enhanced by another factor. In constitutional law philosophic shifts often occur through what appear to be mere tinkerings with technical doctrines. The doctrine in question here had to do with what lawyers call "standing". Persons alleging an interest only as citizens or taxpayers do not generally have standing to challenge constitutional violations in federal court. There must be some direct impact upon a person before he may maintain a legal action. That is true of every single clause of the Constitution from Article I to the Twenty-fifth Amendment -- except for the establishment clause. In 1968, in Flast v. Cohen, the Supreme Court created the rule that taxpayers could sue to enjoin the expenditure of federal funds under that clause. The Court did not explain why every other constitutional provision was left beyond the reach of taxpayer or citizen suits. The unexplained result is that the establishment clause is far easier to enforce than any other clause. Under it alone is an ideological interest sufficient to confer standing to sue.

Let me illustrate... the ideological nature of modern litigation under the clause by describing a case that is now before the Supreme Court.[95] In United States Department of Education v. Felton, the Court of Appeals for the Second Circuit, in a taxpayer suit, held violative of the establishment clause a New York City program, subsidized with federal funds, by which public school teachers who volunteered for the duty taught in private schools, including religious schools.... The record contains no evidence that any teacher complained of interference by private school officials... In fact, the court, before striking the program down, described it as "a program that apparently has done... little, if any, detectable harm."

This case illustrates the power of the revised standing concept to bring into court

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95 The Supreme Court upheld the second circuit decision in this case. Aguilar v. Felton, 87 L.E. 2d 290 (1985).

> suspect that the greatest perceived change would be in the reintroduction of some religion into public schools and some greater religious symbolism in our public life.[94]

(2) Flast v. Cohen, 392 U.S. 83 (1968). Flast held that a federal taxpayer has, as a taxpayer, standing to challenge any federal expenditure which allegedly entails unconstitutional federal assistance to or support for religion. Under most circumstances no individual can challenge the constitutionality of a government act or program unless he or she has been injured by that program. Government federal assistance virtually never entails injuries of the sort ordinarily required to establish standing. Where government assistance to religion is involved, however, Flast permits the enforcement of the Establishment Clause by any taxpayer. The present Supreme Court unanimously adheres to Flast, see Valley Forge College v. Americans United, 454 U.S. 464 (1982); under Flast state taxpayers have standing to challenge allegedly unconstitutional state assistance to religious organizations. Grand Rapids School District v. Ball, 87 L.Ed. 2d 267, 274-75 n.3 (1985).

In 1984 Judge Bork expressed serious doubts as to whether Flast should be the law:

> The potency of the establishment

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94 Speech, Brookings Institution, September 12, 1985, pp.10-11.

> cases in which nobody could show a concrete harm...[96]

Judge Bork clearly regards standing not as technical issue, but as a doctrine that can be used to prevent statutes from being held unconstitutional. He argued in 1986:

> [T]he jurisdictional requirement of standing keeps courts out of areas that are not properly theirs. It is thus an aspect of democratic theory.... Every time a court expands the definition of standing, the definition of the interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts.[97]

This view of broader standing doctrines as anti-democratic, and thus constitutionally unsound, although on its face not restricted to any particular type of litigation, in practice relates primarily to Flast and the Establishment Clause. A violation of almost all other provisions of the Constitution will ordinarily cause a concrete injury to at least some individual; an expansion or contraction of standing will affect who can sue, and when suit may be brought, but in most situations an appropriate plaintiff with unquestioned standing will exist, and the constitutionality of the practice at issue will sooner or

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96 Speech, University of Chicago, November 13, 1984, pp. 2-4.

97 "An Interview with Judge Robert H. Bork," Judicial Notice, v.3, no.4, p.12 (1986).

later be resolved. An "expansion" of standing only "contracts" "democratic rule" when, but for that expansion, there would be no one with standing to challenge the actions of democratically elected officials. The decision in Flast appears to be the only standing decision which fits this description, and Judge Bork clearly regarded Aguilar v. Felton as a case which nobody could have brought were Flast not the law.

In virtually every Supreme Court Establishment Clause case in the last twenty years challenging the constitutionality of government financial or in-kind assistance to religion, the plaintiffs appear to have been federal or state taxpayers, and their standing to sue has rested on Flast.[98] If Flast were overruled, the Establishment Clause would ordinarily be

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[98] Aguilar v. Felton, 87 L.Ed.2d 290, 296 (1985) (federal taxpayers); Grand Rapids School District v. Ball, 87 L. Ed.2d 267, 274 1 (1985) (state taxpayers); Lynch v. Donnelly, 465 U.S. 668, 671 (1984) (city residents); Marsh v. Chambers, 463 U.S. 783, 785 (1983) (state tax payers); Mueller v. Allen, 463 U.S. 388, 392 (1983) (state taxpayers); Wolman v. Walter, 433 U.S. 229, 232 (1977) (state taxpayers); Roemer v. Maryland Board of Public Works, 426 U.S. 736, 744 (1976) (state taxpayers); Meek v. Pittinger, 421 U.S. 349, 356 n.5 (1975) (state taxpayers); Committee for Public Education v. Nyquist, 412 U.S. 756, 762 (1973) (state taxpayers); Sloan v. Lemon, 413 U.S. 825, 826 (1973) (state taxpayers); Hunt v. McNair, 413 U.S. 734, 735, (1973) (state taxpayer); Levitt v. Committee for Public Education, 413 U.S. 472, 478 (1973) (state taxpayers); Tilton v. Richardson, 403 U.S. 672, 676 (1971) (federal taxpayers); Lemon v. Kurtzman, 403 U.S. 60 2, 608 (1971); Walz v. Tax Commission, 397 U.S. 664, 666 (1970) (city taxpayers); but see Board of Education v. Allen, 392 U.S. 236, 238 (1968) (local officials seeking injunction to prevent dismissal for refusal to provide disputed assistance.)

unenforceable in any case in which the federal government, states, or cities provided financial assistance to religious schools or organizations. Indeed, immunizing from judicial scrutiny financial assistance programs which cause no "concrete harms," and thus placing the possible enactment of such aid within "the area of democratic rule," seems to be precisely the purpose of Judge Bork's arguments.

The programs thus immunized from constitutional scrutiny, and Judge Bork's objections, are not limited to comparatively benign, albeit controversial, activities like the limited remedial instruction program provided to parochial school teachers in Aguilar. Direct governmental subsides to religious schools, or even to churches and synagogues, would not "harm" any individual so long as the financial aid was made available to all denominations. If Flast were overruled, there would appear to be no individual who would have standing to sue if, for example, a city or state adopted a non-discriminatory program to provide matching funds for the construction of houses of worship, or to pay the salaries of religious leaders.

D. FOURTH AMENDMENT

(1) Mapp v. Ohio, 367 U.S. 643 (1961) and Boyd v. U.S., 116 U.S. 616 (1886). Mapp held that state officials may not introduce in criminal proceedings evidence seized in violation of the defendants' Fourth Amendment rights. Federal officials have been barred from using illegally obtained evidence since Boyd v. U.S. Although members of the Court have at times differed regarding the scope of the exclusionary rule, Mapp and its progeny have consistently insisted that the rule is necessary to avoid encouraging the police to engage in unconstitutional searches. The exclusionary rule, the Court noted in U.S. v. Leon, 468 U.S. 897 (1984), has provided "the impetus [for]... police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits." 468 U.S. at 919 n.20.

In 1986 Judge Bork stated that he favored reconsideration of the exclusionary rule, and consideration of admitting evidence obtained by means of a deliberate violation of the Fourth Amendment:

> There appear to be two possible reasons for the exclusionary rule. One is to deter unconstitutional police behavior. It is still being debated whether or not the rule does do that. The other reason sometimes given is that courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence. I have never been

> convinced by that argument because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society. The only good argument really rests on the deterrence rationale, and its time we examine that with great care to see how much deterrence we are getting and at what cost.[99]

This comment raises two broad constitutional issues. First, Judge Bork suggests that the goal of convicting the guilty should always outweigh, in the conscience of the court, any impropriety in admitting and relying on evidence obtained in violation of the Constitution, regardless, it would appear, of the magnitude or deliberateness of the violation. All of the constitutional provisions that affect the criminal process will, under some circumstances, result in the freeing of guilty defendants; if the courts were obligated to attach paramount importance to convicting every possible guilty defendant, that requirement would call into question the duty and authority of the courts to enforce any constitutional guarantee where it might bring about such a result.

Judge Bork's proposed cost-benefit analysis of the deterrent effect of the exclusionary rule appears to contemplate some form of moral calculus in which a court would somehow weigh the number of unconstitutional searches prevented by the exclusionary rule against the number of guilty criminals acquitted as a

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[99] "An Interview with Judge Robert H. Bork," Judicial Notice, v.3, no.4, p.6, June 1986.

consequence of that rule. One thousand unconstitutional searches, might for example, outweigh 500 acquitted burglars, but not 1500 acquitted burglars. While such a cost-benefit analysis might be appropriate if the desirability of the exclusionary rule were being evaluated by the Office of Budget and Management, it is difficult to find any authority for such an analysis in the language of the Bill of Rights or the views of the framers of the Constitution.

E. DUE PROCESS

(1) Youngerblood v. Romeo, 457 U.S. 307 (1982). In Youngerblood the Supreme Court ruled unanimously that a patient in a government-operated mental hospital had "a constitutional right to minimally adequate care and treatment." 457 U.S. at 318-21. The Court also agreed that such a patient had a constitutional right, while so confined, to protection from attacks by inmates and hospital officials, and could not constitutionally be shackled or otherwise physically restrained except when clearly necessary. 457 U.S. at 310. In O'Connor v. Donaldson, 422 U.S. 503 (1975), the Supreme Court unanimously concluded that a state could not confine a mentally ill patient in a mental hospital against his will, unless the individual was either dangerous to others or incapable of surviving safely outside of the facility. The patient, who had never committed any dangerous act, or been thought likely to harm himself, and who had been self-supporting for 14 years prior to his confinement, was held against his will for 15 years in a state mental institution, despite offers of both a halfway house and a family friend to care for him. 422 U.S. at 568-69. These appear to be the only recent Supreme Court decisions regarding the constitutional rights of persons in mental hospitals.

In a 1983 speech to the South Carolina Bar Association, Judge Bork argued that the heavy work load of the federal courts

was caused in part by the improper recognition of new constitutional rights during the previous three decades:

> With a degree of adventurism -- some might call it imperialism -- unknown until thirty years ago, federal courts have found in the Constitution a warrant for thrusting themselves into areas of life that this nation had always supposed properly governed by elected officials[:] schools, mental homes.... The results of all this have been horrendous, not least for the judicial system.[100]

Judge Bork did not refer to any specific decisions by name.

(2) Goss v. Lopez, 419 U.S. 565 (1975). In a 1982 speech, Judge Bork, in criticizing the Supreme Court for "creating individual rights which are not to be found in the Constitution," argued:

> From a constitutional perspective...matters such as...public school discipline...and the like have always been considered, throughout history, as matters for the local police power reserved to the states. It is conventional and correct to question the legitimacy of judicial incursions into these fields, because they were previously thought committed to democratic choice.[101]

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100 Speech, South Carolina Bar Association, January 15, 1983, p.6.

101 Speech, Federalist Society, Yale Law School, April 24, 1982, pp.4-7.

The Supreme Court decision regarding public school discipline is Goss v. Lopez. The plaintiffs in Goss were public school children who were suspended from school for periods of up to 10 days without ever being told what they were accused of doing, or being afforded any opportunity to tell school authorities their version of the relevant facts. The Supreme Court concluded that, although students were not entitled to the formalities of a judicial proceeding, they could not be suspended on the basis of allegations which remained secret:

> [Due] process required, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story...In the great majority of cases the disciplinarian may informally discuss the alleged misconduct minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.

419 U.S. at 581-82.

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F. PRIVACY

(1) Griswold v. Connecticut, 381 U.S. 479 (1965). This case involved a constitutional challenge to a state law making it a crime to use any birth control device or to provide any person with birth control information or devices. The Connecticut law at issue provided:

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than sixty days not more than one year or be both fined and imprisoned.[102]

A companion provision imposed the same penalty on any person who "assists," "abets" or "counsels" anyone in the use of such contraceptive. The statute forbade the use of birth control information, even where pregnancy would imperil the health or life of the mother. 381 U.S. at 503. One of the defendants in Griswold was a professor at the Yale Medical School who was prosecuted for providing birth control information to married couples. The Supreme Court held that the Connecticut law unconstitutionally invaded the privacy of couples wishing to use birth control devices.

In 1971 Judge Bork criticized Griswold at length:

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102 Conn. Gen. Stat. Sec.53-32 (1958).

> The Court's Griswold opinion, by Justice Douglas, and the array of concurring opinions, by Justices Goldberg, White and Harlan, all failed to justify the derivation of any principle used to strike down the Connecticut anti-contraceptive statute or to define the scope of the principle....
>
> The Griswold opinion fails every test of neutrality. The derivation of the principle was utterly specious, and so was its definition. In fact, we are left with no idea of what the principle really forbids....
>
> Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it. We are left with no idea of the sweep of the right to privacy and hence no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in Griswold through principle.[103]

Bork insisted that a married couple's interest in the use of birth control was indistinguishable in importance from the legislature's desire to prevent what it regarded as immoral conduct by such couples:

> In Griswold a husband and wife assert they wish to have sexual relations without fear of unwanted children. The law impairs their sexual gratifications. The State can assert, and at one stage in that litigation did assert, that the majority finds the use of contraceptives immoral. Knowledge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications....

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103 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 8-9 (1971).

> There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another. Why is sexual gratification more worthy than moral gratification?

(Id. at 9-10).

The Connecticut statute invalidated in Griswold has since been repealed but other statutes held invalid under Griswold remain in existence. In Eisenstadt v. Baird, 405 U.S. 438 (1978), the Supreme Court, relying on Griswold, declared unconstitutional a state law which made it a crime to provide any birth control device to an unmarried person, and made it a crime for any person but a physician or pharmacist to supply such devices even to a married couple.[104] The statute also forbade the writing or printing of any "card, curriculum, book, pamphlet, advertisement or notice of any kind" disclosing how any birth control device could be obtained. That Massachusetts law, which imposed a penalty of up to 5 years imprisonment for any violation, remains in effect.[105]

Another case, Carey v. Population Services International, 431 U.S. 678 (1977), held unconstitutional a New York law, which

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104 See Baird v. Lynch, 390 Fed. Supp. 740 (W.D. Wisc. 1974) invalidating prohibition against sales of contraceptives to unmarried individuals.

105 Massachusetts General Laws Ann., c.272, 21-21A.

has not been repealed, that made it a crime (1) for any person other than a licensed pharmacist to provide contraceptives to any person over 16, (2) for any person other than a licensed pharmacist to provide contraceptives to any person under 16, and (3) for any person to advertise any birth control device.[106] Both the majority, and Justice Powell in a concurring opinion, relied on the earlier decision in Griswold. Approximately one third of the states today have in effect statutes which restrict the sale of birth control devices, and which restrict the advertising of such materials. 431 U.S. at 714, n.1 (Stevens, J., concurring).[107]

Since becoming a federal judge, Judge Bork has reiterated publicly and frequently his disagreement with Griswold and its progeny. In 1982 Judge Bork denounced Griswold as one of "[t]he most dramatic examples of noninterpretivist review" which arrived at a conclusion that could not "have been reached by interpretation of the Constitution."[108] The principle of constitutional adjudication on which Griswold was based, Bork

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106 New York Education Law Section 6811 (8).

107 See, e.g., Idaho Code Section 18-603 (prohibiting advertisement regarding contraception); Michigan Comp. Law Ann. Section 750.40 (prohibiting certain publications regarding birth control); Mississippi Code Ann. Section 41-42-7 (restricting distribution of contraceptives tc minors); Montana Code Ann. Section 45-8-204 (prohibiting any advertisement regarding contraceptives, or distribution of devices by persons other than doctors and pharmacists).

108 Speech, Catholic University, March 31, 1982, p.3.

charged, was that:

> ... [c]ourts are not confined to following the Constitution, but may, in significant respects, remake the Constitution.... One way of stating the result is that, in certain areas of life, individual freedom expands and governmental regulation contracts. A second way of stating the result is that goods, including the power to enforce one's preferences, are redistributed from one group of persons to another.[109]

In another speech that year Judge Bork expanded his objection to encompass "Griswold v. Connecticut, all the sexual freedom cases," characterizing them as involving "the imposition of upper middle class, college educated, east-west coast morality."[110]

Again in 1983, Judge Bork expressed his view that at bottom Griswold was about, not merely the use of contraceptives, but "a legislative choice that prohibits certain forms of sexual behavior." "Justice Douglas," Bork objected, had "created a constitutional right to privacy" by means of an "extreme generalization" of the principles underlying specific constitutional provisions:

> By choosing that level of abstraction, the Bill of Rights was expanded beyond known intentions of the Framers. Since there is no

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109 Id. at 3-4.

110 Speech, Federalist Society, Yale University, April 24, 1982, pt. 2, pp.8-9.

> constitutional text or history to define the right, privacy becomes an unstructured source of judicial power.[111]

In 1984 Judge Bork expressed in even sharper terms his view that the real issue in Griswold and its progeny was an attempt by the Supreme Court to interfere with government control of sexual morality:

> One notes the rise of the so-called right to privacy cases, which deal mainly with sexual morality and which generally conclude that sexual morality may be regulated only in extreme cases. These trends share the common theme that morality is not usually the business of government but is instead primarily the concern of the individual.[112]

Thereafter Judge Bork repeatedly referred to Griswold and the decisions relying on it as "the so-called right to privacy cases, which deal with sexual morality."[113] In an interview published in 1986 Judge Bork reiterated his adherence to the objection to Griswold which he had first expressed in 1971:

> I don't think there is a supportable method of constitutional reasoning underlying the

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111 Speech, University of San Diego Law School, December, 1983, p.10.

112 Speech, Brookings Institution, September 12, 1985, p.6.

113 Speech, University of California at Berkeley, April 29, 1985, p.6; Speech, Canisius College, October 8, 1985, p.4; Speech, UCLA, April 24, 1985, p.8; Speech, University of Chicago, November 13, 1984, p.10.

> Griswold decision. The majority opinion merely notes that there are a lot of... guarantees of aspects of privacy.... Of course, that right of privacy strikes without warning. It has no intellectual structure to it so you don't know in advance to what it applies.[114]

(2) Roe v. Wade, 410 U.S. 113 (1973). Roe held that a state may not forbid a woman to have an abortion during the early stages of a pregnancy. Justice Powell joined in the majority opinion. Subsequent Supreme Court decisions have held unconstitutional a variety of state statutes adopted for the purpose of preventing a woman from choosing to have an abortion.

In 1981 Judge Bork testified, "I am convinced, as I think most legal scholars are, that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority."[115] In other speeches in that year Judge Bork asserted that the public had not been taken in by the legal analysis in the Roe decision. "The public is coming to understand that decisions like Roe v. Wade rest on no constitutional foundation."[116] "Roe v. Wade is perceived as merely one example of the judiciary's increased

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114 "An Interview with Judge Robert H. Bork," Judicial Notice, v.3, no.4, p.9 (June 1986).

115 Hearings on the Human Life Bill before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Congress, 1st Session, pp.310, 315 (1981).

116 Speech, Seventh Circuit, p.7, (1981?).

willingness to deny communities the ability to reflect their deepest moral sense in law."[117]

After becoming a federal judge in 1982, Judge Bork stepped up his attacks on Roe. In a March, 1982 speech at Catholic University, he denounced Roe as one of "[t]he most dramatic examples of noninterprevist review in our history," a decision which "could not have been reached by interpretation of the Constitution."[118] In an April, 1982, speech to the Federalist Society, Judge Bork suggested that Roe could best be understood as an attempt to impose on the nation the moral views of the social class to which the members of the Supreme Court belonged:

> I suggest to you... that we are seeing not merely a shift from democratic to judicial rule, but a shift from local, diverse moral choices to a nationalization of morality through the creation of new constitutional rights. Because these new constitutional rights reflect the values of one class, I think it is proper to call it the gentrification of the Constitution.
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> Roe v. Wade is the classic instance. The court there nationalized an issue which is a classical case for local control. There is simply no national moral consensus about abortion, and there is not about to be. But the Court, by nationalizing that issue, has now taught both sides to seek a resolution at the national level. The strong opponents, on both sides, want to keep it at a national level because they want a flat rule and that promises to be an enormously divisive

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117 Speech, Federal Legal Council, October 29, 1981, p.6.

118 Speech, Catholic University, March 31, 1982, p.4.

> political issue for that reason. It is an issue that really ought to be back in the states.[119]

In 1983 Judge Bork reiterated this class theory of Roe:

> No scholar will ever satisfactorily explain why it was an illegitimate exercise of the judicial power for the bad old Court to strike down New York's maximum hours law as an unreasonable infringement of liberty in the Lochner decision of 1905 but an enlightened application of the same due process clause to strike down Texas' abortion statute in Roe v. Wade....
>
> I want to suggest a more mundane hypothesis: the shift from Lochner to Roe represents no advance in jurisprudential analysis or constitutional insight. It represents only a change in the dominant political class in American society.
>
> Power has shifted away from business, which applauded Lochner, toward what may be loosely termed a professional intellectual class... The dominant strains of their opinion at the moment appear to be egalitarian and legalistic.... They favor freedom, it would appear, primarily from laws enforcing conventional, bourgeois morality. Hence, Griswold v. Connecticut and Roe v. Wade.[120]

In a 1984 interview, Judge Bork commented, "I don't think it's any of the court's business to intrude. I just don't think there

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119 Speech, Federalist Society, Yale University, April 24, 1982, pp.8-9; see also Notes for Speech, NYU Law Review Banquet, May 1, 1982, p.3.

120 Speech, Harvard Law School, September 15, 1983, pp.5-6.

was anything in the Constitution about it."[121]

If Roe were overturned, the legal status of abortion would return to the crazy-quilt pattern that existed in 1973 -- abortion would be entirely permitted in some states, absolutely forbidden in other states, and restricted in varying degrees in yet other states. Whether or not a woman could obtain a safe, legal abortion would depend on where she lived and on whether, if a resident of a state prohibiting abortion, she could afford to travel to a state permitting the procedure. Prior to 1973 states which forbade abortions sought to utilize criminal prosecutions to prevent women from going out of state for abortions; among those prosecuted were newspaper editors who printed advertisements for out-of-state abortion services, and travel agents who arranged trips for women seeking abortions. See Bigelow v. Virginia, 421 U.S. 809 (1975).

(3) Meyer v. Nebraska, 262 U.S. 390 (1922). This case dealt with a state law which made it a crime "to teach any subject to any person in any language other than the English language" in a public or parochial school, and forbade the teaching of a foreign language to any student who had not completed the eighth grade. The state prosecuted an instructor at the Zion Parochial School, a school affiliated with the Zion Evangelical Lutheran

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121 "Robert Bork: In His Own Words," Washington Post, July 5, 1987.

Congregation, because he had utilized in class "a collection of Biblical stories" in German. 262 U.S. at 397-98. The state argued that these prohibitions were needed to assure "that the English language should be and become the mother tongue of all children reared in this state." 262 U.S. at 401.

The Supreme Court held the law unconstitutional, reasoning that the "liberty" protected by the Due Process Clause included a right to decide how to raise and educate one's children:

> Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual... to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience... Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life...
>
> [T]he state may do much, go very far, indeed, in order to improve the quality of its citizens... but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all -- to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution.

262 U.S. at 399-401.

Judge Bork has criticized Meyer as "wrongly decided," arguing that the Due Process Clause should not be construed to

protect any specific substantive liberties, since the Constitution fails to specify "which liberties or gratifications may be infringed by majorities and which may not."[122]

A Supreme Court decision overruling Meyer would open the door to two types of serious abuses. First, the states would be able to prohibit any form of bilingual education, even in private schools, and require that children be taught only in English, regardless of whether the children were recent immigrants who spoke only Spanish, Chinese or some other foreign language. Proponents of the contemporary "English Only" movement have in fact advocated a variety of restrictions on bilingual education. Second, legislation such as that in Meyer prohibiting instruction in a foreign language would impose a serious burden on parochial schools, such as Hebrew Day Schools, which for religious reasons conduct part of their instruction in a foreign language.[123]

(4) Pierce v. Society of Sisters, 268 U.S. 510 (1925). This decision struck down an Oregon law which required that all children between the ages of 8 and 16 be sent "to a public school

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122 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 11 (1971).

123 The Nebraska statute, although literally applicable to foreign languages, was construed by the state courts to be inapplicable to Latin, Greek and Hebrew. 262 U.S. at 400-401. As so construed the law burdened the activities of the Lutherans at the Zion Parochial School, but would have imposed no comparable burden on Jewish or Roman Catholic Parochial Schools.

for the period of time a public school shall be held during the current year." 268 U.S. at 530. The plaintiff was a Catholic order which operated a system of parochial schools at which students received an education in secular subjects as well as "[s]ystematic religious instruction and moral training according to the tenets of the Roman Catholic Church." 268 U.S. at 532. The enforcement of the law effectively precluded the Society of Sisters from operating parochial schools for children between 8 and 16.

The Supreme Court held that the Oregon law violated the Due Process Clause:

> Under the doctrine of Meyer v. Nebraska...we think it entirely plain that the Act...unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control...The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

268 U.S. at 535-56.

In 1971 Judge Bork argued that Pierce, like Meyer, was "wrongly decided," although "perhaps Pierce's results could be

reached on alternative acceptable grounds."[124] Although Judge Bork leaves open some possibility that an alternative basis could be found for Pierce, there is no doubt that if Pierce were overruled, the states would be free to effectively abolish private parochial schools, and to forbid parents competent to do so from educating their children at home.

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124 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 11 (1971).

G. RACIAL DISCRIMINATION

(1) Shelley v. Kraemer, 334 U.S. 1 (1948). In this case the Supreme Court ruled unanimously that the state courts of Michigan could not constitutionally enforce a restrictive covenant which forbade the sale or lease of a home to "people of the Negro or Mongolian race." 334 U.S. at 5. The Court concluded that judicial enforcement of the racial covenant constituted unconstitutional racial discrimination. Shelley was a landmark decision which triggered the process of judicial evolution which culminated in Brown v. Board of Education. 347 U.S. 483 (1954).

In 1971 Judge Bork argued that Shelley was wrongly decided:

> I doubt... that it is possible to find neutral principles capable of supporting... Shelley v. Kraemer.... The decision was, of course, not neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish....
>
> Shelley... converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion.[125]

The continuing vitality of Shelley is important for two reasons. First, although Title VIII forbids in certain instances

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125 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 15-16 (1971).

discrimination in the sale or lease of housing, that statute contains a number of exemptions. If the owner of a house does not use either a broker or newspaper advertisements, the restrictions of Title VIII do not apply; also exempt is the lease of a room or apartment in a small owner-occupied dwelling. See 42 U.S.C. Sec. 3603(b)(1)-(3). In these cases the owner or landlord would apparently be covered by the 1866 Civil Rights Act, but that statute forbids only discrimination on the basis of race. Jones v. Alfred Mayer Co., 392 U.S. 409 (1968). Second, Shelley has been construed by the Supreme Court to forbid a state court to award damages for a violation of a contract which required the defendant to engage in racial discrimination. Barrows v. Jackson, 346 U.S. 249, 258 (1953).

(2) Katzenbach v. Morgan, 384 U.S. 641 (1966) and Oregon v. Mitchell, 400 U.S. 112 (1970). These two decisions concern the validity of certain portions of the Voting Rights Act as originally enacted in 1965, and as amended in 1970. In Katzenbach v. Morgan the Supreme Court upheld the constitutionality of section 4(e) of the 1965 Act, which prohibited the states from requiring that a prospective voter be able to read or write in English if he or she had attended a school in the United States or Puerto Rico which was taught in a language other than English. The primary effect of section 4(e) was to enfranchise the large number of Puerto Rican Americans who were literate in Spanish rather than English. The Supreme Court

concluded that, regardless of whether a court might not hold the English language literacy requirement unconstitutional, Congress could ban the test pursuant to the authority of section 5 of the Fourteenth Amendment.

In Oregon v. Mitchell the Court upheld two relevant portions of the 1970 amendments to the Voting Rights Act. First, the Court unanimously agreed that section 201 of the Act, which established a national ban on literacy tests, was unconstitutional, 400 U.S. at 118; some members of the Court relied on section 5 of the Fourteenth Amendment, while others relied on section 2 of the Fifteenth Amendment. Second, the Court by a vote of 8-1 upheld section 202 of the Act, which provided that the states must permit any eligible person to register to vote in a presidential election until 30 days prior to the date of the election. Before the enactment of section 202, a number of states had enforced durational residence requirements which effectively disenfranchised any voter who moved in the summer or fall preceding a presidential election.

Judge Bork has repeatedly criticized the decision in Katzenbach v. Morgan. In a 1972 pamphlet he wrote:

> The Morgan decision embodies revolutionary constitutional doctrine, for it overturns the relationship between Congress and the Court. Under American constitutional theory, it is for the Court to say what constitutional commands mean and to what situations they

> apply. Congress may implement the Court's interpretation, as it is specifically empowered to do by Section 5 of the Fourteenth Amendment. But Section 5 was intended as a power to deal with implementations only. Morgan would also overturn the relationship between federal and state governments. Once Congress is conceded the power to determine what degree of equality is required by the equal protection clause, it can strike down any state law on the ground that its classifications deny the requisite degree of equality. Morgan thus improperly converts Section 5, which is a power to deal with remedies, into a general police power for the nation.[126]

In testimony given the same year Judge Bork reiterated his disagreement with "the broad, revolutionary sweep of the opinion."[127]

In 1973 Judge Bork again argued that Katzenbach v. Morgan was "incorrect." (1973 Confirmation Hearing, p.16). Most recently Judge Bork asserted in 1981, "I agree entirely with the dissent ... in Katzenbach v. Morgan."[128]

> [I]n Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court held that Congress could

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126 R. Bork, Constitutionality of the President's Busing Proposals, American Enterprise Institute, p.10 (1972).

127 Hearings on the Equal Educational Opportunity Act before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 92nd Cong., 2d Sess, p.1509 (1972).

128 Hearings on the Human Life Bill before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., p.310, 1981.

> eliminate literacy in English as a condition for voting by exercising the power granted in section 5 of the Fourteenth Amendment. In Oregon v. Mitchell, 400 U.S. 112 (1970), a unanimous Court upheld Congress' elimination of all literacy tests. There are other decisions that declare a congressional power to define substantive rights guaranteed by the thirteenth, fourteenth, and fifteenth amendments by employing the granted power to "enforce" the provisions of those amendments.... [It is] my conviction that each of these decisions represents very bad, indeed pernicious, constitutional law.[129]

In a speech to the Seventh Circuit, apparently given in 1981, Judge Bork denounced the decision in even stronger terms:

> Katzenbach v. Morgan is terrible constitutional law. It stands for a revolution in the constitutional roles of the judiciary and the legislature. It cannot live in the same jurisprudence with Marbury v. Madison.... Liberal approval of Katzenbach v. Morgan was unprincipled.[130]

If the Supreme Court were to overrule Katzenbach v. Morgan and Oregon v. Mitchell, the practical consequences would be immediate and drastic. First, all existing state literacy requirements would immediately go back into effect. The New York English language requirement at issue in Katzenbach is still contained in the state constitution. New York Constitution, Article II Sec.1. The effect of this provision would be to

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129 Id. at 313-4.

130 Speech, Seventh Circuit, undated, p.5.

disenfranchise several hundred thousand Puerto Rican residents of New York; approximately 40% of the Puerto Ricans now registered to vote could be challenged for cause as ineligible to vote. A similarly sweeping disenfranchisement would occur in other states which now cannot enforce their literacy tests; a disproportionate number of those removed or barred from the registration rolls could be black.

Second, if Judge Bork's objections to Katzenbach v. Morgan were accepted by the Court, a number of the civil rights statutes adopted in the last 120 years would probably be declared unconstitutional, at least in part. In City of Rome v. United States, 446 U.S. 156 (1980), the Supreme Court relied on Katzenbach v. Morgan and Oregon v. Mitchell in rejecting a challenge to the constitutionality of the "discriminatory effect" standard applied under the Voting Rights Act. 446 U.S. at 176-78. Several members of the Supreme Court have noted that the application of the Title VII "discriminatory effect" test to the states may also turn on the meaning and vitality of Katzenbach v. Morgan. Fitzpatrick v. Bitzer, 427 U.S. 445, 458 (Brennan, J., concurring). The 1866 Civil Rights Act, which prohibits a wide variety of types of discriminatory action by private individuals, has been upheld under the enforcement section of the Fourteenth Amendment, even though such private conduct is not state action and does not violate either the Thirteenth or Fourteenth Amendments. Runyon v. McCrary, 427 U.S. 160, 179 (1976); Jones

v. Alfred Mayer Co., 392 U.S. 409, 437-44 (1968).[131] The 1866 Act probably could not be upheld if Katzenbach were overturned, and Judge Bork's 1981 critical reference to Thirteenth Amendment cases is probably a reference to Runyon and Jones. Finally, the Supreme Court has held that Congress can make it a crime for private individuals to engage in conspiracies or violence for the purpose of punishing or preventing exercise of constitutional rights, such as the right to vote. United States v. Guest, 383 U.S. 745, 762 (Clark, J., concurring), 781-84 (Brennan, J., concurring) (1966). Since such private conspiracies and violence are not state action, and thus do not themselves violate the Constitution, Congress might well be powerless in Judge Bork's view to protect Americans who exercise their constitutional rights from attack or retaliation by such extremist groups as the Ku Klux Klan.

(3) Reitman v. Mulkey, 387 U.S. 369 (1967). Between 1959 and 1963 the California legislature adopted a series of civil rights statutes, prohibiting discrimination in housing on the basis of race, national origin or religion. In 1964 a statewide referendum adopted what was known as Proposition 14, which added to the California constitution a prohibition against any legislation which abridged "the right of any person... to declare

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131 See also District of Columbia v. Carter, 409 U.S. 418, 423 n.8 (1973). (Congress may proscribe "purely private conduct under section 5 of the Fourteenth Amendment") (citing Katzenbach v. Morgan).

to sell, lease or rent [real] property to such person or persons as he, in his absolute discretion, chooses." Cal. Const., Act I, section 26. The effect of Proposition 14 was to invalidate the state's open-housing statutes. The California Supreme Court held that Proposition 14 violated the Fourteenth Amendment; the Supreme Court affirmed that decision. 387 U.S. at 376-81.

The United States Supreme Court, in an opinion written by Justice Byron White, concurred in the view of the California Supreme Court that Proposition 14 was invalid because, unlike a mere repeal of the state's civil rights law, Proposition 14 "was intended to authorize, and did authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State." 387 U.S. at 381.

In 1968 Judge Bork argued that Reitman was wrongly decided.

> [T]he extent to which [the Supreme] Court, in applying the Fourteenth Amendment, has departed from both the allowable meaning of the words and the requirements of consistent principle is suggested by Reitman v. Mulkey. There the Court struck down a provision that had been added to the California constitution by referendum. The provision guaranteed owners of private property the right to sell or lease, or refuse to do either, for any reason they chose. It could be considered an instance of official hostility only if the federal Constitution forbade states to leave private persons free in the field of race relations. That startling conclusion can be neither fairly drawn from the Fourteenth Amendment nor stated in a principle capable

of being uniformly applied.[132]

Judge Bork's objections to Reitman were not limited to the peculiar circumstances of that case. In his view the Fourteenth Amendment would not apply to any government constitution, charter or rule which merely left "private persons free in the field of race relations." The Supreme Court in cases following Reitman has squarely rejected this approach, holding that a state or city is free to repeal civil rights laws, but that it cannot adopt rules which establish special obstacles to the enactment of such anti-discrimination measures. In Hunter v. Erickson, 393 U.S. 385 (1969), the Akron City Charter was amended to require that any open housing ordinance be approved by a public referendum. This provision apparently satisfied Judge Bork's test, since it went no farther than permitting private persons to act as they saw fit; indeed, the Akron Charter was less restrictive than Proposition 14, since it expressly permitted the adoption of open housing laws if approved by a subsequent referendum, whereas Proposition 14 constituted an absolute prohibition against such anti-discrimination measures. The Supreme Court nonetheless concluded that the Akron charter provision was unconstitutional:

> [A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no

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132 R. Bork, "The Supreme Court Needs a New Philosophy," Fortune, December 1985, p. 166.

> protection against discrimination and if it did, a referendum might be bothersome but no more than that... [The Charter provision] places special burdens on racial minorities within the governmental process.... [T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote.... Cf. Reynolds v. Sims, 377 U.S. 533 (1964).[133]

393 U.S. at 391-93. Although the application of this rule has occasioned some disagreement, as of 1982 the entire Supreme Court endorsed the principles announced in Hunter. Washington v. Seattle School District No.1, 458 U.S. 457, 468, 470 (majority opinion), 495-97 (Powell, J., dissenting) (1982).

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[133] Judge Bork, of course, believes that Reynolds v. Sims was wrongly decided.

H. EQUAL PROTECTION

(1) United States v. Carolene Products Co., 304 U.S. 144 (1938). The Supreme Court's increased vigilance, over the course of the last half century, in enforcing fundamental constitutional rights has its roots in a renowned (at least among judges and lawyers) footnote in Carolene Products. Although that decision upheld as constitutional the particular economic regulation at issue, and recognized a presumption that such measures were valid, Justice Stone suggested that more searching scrutiny might well be appropriate in certain other types of cases:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth....
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation....
>
> Nor need we inquire whether... prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. at 152 n.4. The second quoted paragraph led to decisions such as Reynolds v. Sims and Harper v. Virginia Board of Elections, while the principles suggested in the third paragraph came to fruition in Supreme Court decisions applying heightened scrutiny to government actions imposing disadvantages on women, aliens, and illegitimate children.

In 1982 Judge Bork expressly objected to the second and third paragraphs in Footnote 4:

> One might be excused for thinking that in the First Amendment the court had all the authority necessary to protect political processes and in the Fourteenth all that is needed to protect racial and ethnic minorities. But it is clear the footnote means more than these things and, to the degree it does, it necessarily involves judges in subjective and arbitrary constitutional adjudication.[134]

Judge Bork went on, in a passage set out in the section of this report regarding discrimination on the basis of sex, to assert that the Supreme Court, in extending special scrutiny under the Fourteenth Amendment beyond racial and ethnic groups, had acted in an unprincipled manner, reading into the Constitution "current fads in sentimentality."[135]

(2) Discrimination on the Basis of Sex. For at least 14

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[134] Speech, Catholic University, March 31, 1982, p. 17.

[135] Id. at 18-19

years the Supreme Court has held that the Equal Protection Clause forbids discrimination on the basis of sex absent some significant governmental need to make such distinctions. In 1980 every member of the Supreme Court except Justice Rehnquist agreed that gender discrimination was unconstitutional except where it "serve[s] important governmental objectives and... the discriminatory means employed [are] substantially related to the achievement of those objectives." Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980).

Judge Bork, however, has maintained that such special scrutiny under the Equal Protection Clause should be limited to discrimination on the basis of race. "[C]ases of race discrimination aside, it is always a mistake for the court to try to construct substantive individual rights under the due process or equal protection clause."[136]

In a 1982 speech Judge Bork denounced the Supreme Court for "nationalizations of morality, not justified by anything in the Constitution, justified only by the sentimentalities or the morals of the class to which these judges and their defenders belong."[137]

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136 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 17 (1971).

137 Speech, Federalist Society, Yale University, April 24, 1982, pt.2, p.10.

> It happens with the extension of the Equal Protection Clause to groups that were never previously protected. When they begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them.[138]

In Judge Bork's view the constitutional doctrine that the state and federal governments may no longer deny to women the same fundamental rights accorded to men is a rule with no relationship to the principles of the Equal Protection Clause, but just the passing morality of the intellectual class. Judge Bork also argued in that speech:

> From a constitutional prospective.... matters such as... drinking ages... having always been considered, throughout our history, as matters for the local police power reserved to the states. It is conventional and correct to question the legitimacy of judicial incursions into the fields because they were previously thought committed to democratic choice.[139]

The criticism of the Supreme Court with regard to "drinking ages" is undoubtedly a reference to Craig v. Boren, 429 U.S. 190 (1976), which held unconstitutional a state law establishing different minimum ages at which young men and young women could buy beer.

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[138] Id. at 9.

[139] Id. at pt.1, p.7.

In another 1982 speech Judge Bork set out at length objections to the Supreme Court decisions which had held that the Fourteenth Amendment required special scrutiny, not only of statutes disadvantaging racial minorities, but also of laws disadvantaging women and other victims of discrimination. Judge Bork elaborated his objections to footnote 4 in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), which had suggested a heightened degree of scrutiny of measures that reflected "prejudice against discrete and insular minorities":

> That sounds relatively bland, but in fact it is not and the application of the idea of "prejudice against discrete and insular minorities" has led, and inevitably so, to vastly increased judicial subjectivity and power at the expense of political democracy. We know that, historically, the Fourteenth Amendment was meant to protect former slaves. It has been applied to other racial and ethnic groups and to religious groups. So far, it is possible for a judge to minimize subjectivity.
>
> But when we abandon history and a very tight analogy to race, as we have, the possibility of principled judging ceases. Every group that loses in a legislative contest is, by definition, a "minority." Courts cannot protect all minorities against legislative losses for that would turn the democratic process upside down. How does a judge decide that a particular minority's loss was due to "prejudice" and that they are "discrete and insular" so that they are unlikely to win enough of the time?
>
> He must identify from among all those who have lost in the legislature which are the preferred minorities. To say that "prejudice" has made a minority "discrete and

> insular" is to make the ultimate value judgment that this is a group which should not have lost but should have won in the democratic process. That is a flat replacement of democratic choice with judicial choice. There being no criteria available to the court, the identification of favored minorities will proceed according to current fads in sentimentality.
>
> The judge must next ask whether the majority's rationale for the disability imposed is adequate. This involves the judge in deciding which motives for legislation are respectable and which are not, a denial of the majority's right to choose its own rationales.
>
> ...[I]t is not explained why courts are entitled to tell the legislature their moral judgements are really prejudices and that their perceptions of social reality are skewed.[140]

Judge Bork noted that one of the consequences of the type of analysis to which he objected was that the courts had invalidated various forms of discrimination against women.[141]

In 1987 Judge Bork reiterated, "I do not think the Equal Protection Clause probably should have been kept to things like race and ethnicity."[142] He repeated his criticism of Craig v. Boren, asserting that that decision "trivialize[d] the Constitution and... spread it to areas it did not address."[143]

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140 Speech, Catholic University, March 31, 1982, pp.18-19.

141 Id. at 19.

142 Worldnet Interview, June 10, 1987, p.12.

143 Worldnet Interview, June 10, 1987, p.13.

Judge Bork's argument suggests that the Supreme Court, in deciding to apply special scrutiny to laws discriminating on the basis of sex, was merely accepting "current fads in sentimentality." The Supreme Court's own explanation for its treatment of discrimination on the basis of sex is quite different:

> There can be doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was romanticized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage....
>
> As a result of notions such as these, our statute books gradually became laden with gross stereotyped distinctions between the sexes, and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to serve as legal guardians of their own children....
>
> It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena....
>
> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the

> accident of birth, the imposition of special disabilities upon the member of a particular sex because her sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility...."

Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973) (plurality opinion).

(3) Levy v. Louisiana, 391 U.S. 68 (1968). This decision declared unconstitutional a state law which provided that only legitimate children, but not children born out of wedlock, could bring a wrongful death action if their mother was killed. The Supreme Court reasoned:

> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong inflicted on the mother. The children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.

391 U.S. at 72. Judge Bork, in the passage quoted in the discussion of Skinner, asserted that Levy was wrongfully decided.

Although the Supreme Court in Levy reasoned that distinctions between legitimate and illegitimate children were not rational, (391 U.S. at 71), the subsequent decisions have held that discrimination on the basis of illegitimacy must meet a special standard of constitutional scrutiny, less searching than

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the strict scrutiny applied to racial classifications, but more stringent than a mere rational basis test. Trimble v. Gordon, 430 U.S. 782, 767 (1977) (majority opinion by Justice Powell). Justice Powell reasoned this standard was necessary because illegitimate children have "been a frequent target of discrimination." 430 U.S. at 775 n.16. This special scrutiny is clearly inconsistent with Judge Bork's view that the Equal Protection Clause forbids only discrimination on the basis of race.

Supreme Court decisions since Levy have held unconstitutional a variety of practices which imposed special legal disabilities on illegitimate children and their parents. Trimble v. Gordon, supra (illegitimate children forbidden to inherit from their father's under interstate succession) (citing Levy); Jiminez v. Weinberger, 417 U.S. 628 (1974) (illegitimate children ineligible for certain social security benefits) (Justice Powell joined majority opinion); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (families with illegitimate children ineligible to participate in state program of assistance to families of the working poor) (citing Levy) (Justice Powell joined the majority opinion); Gomez v. Perez 409 U.S. 535 (1973) (fathers obligated to provide financial support only for legitimate, not illegitimate children) (citing Levy) (Justice Powell joined the majority opinion); Weber v. Aetna Casualty & Security Co., 406 U.S. 164 (1972) (illegitimate

children ineligible for certain workman's compensation benefits) (citing Levy) (majority opinion by Justice Powell); Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968) (parents of illegitimate children barred from bringing wrongful death actions).

In a 1982 speech, quoted in the section on sex discrimination, Judge Bork argued at length against the Supreme Court's decision to interpret the Equal Protection Clause to forbid discrimination against any group other than racial and ethnic minorities.[144] Judge Bork described as one of the unwarranted consequences of this interpretation the removal of "disabilities imposed by legislation upon... illegitimates."[145] Groups other than racial and ethnic minorities, he urged, must seek to advance their interests through the "democratic process," and cannot complain to the courts if disappointed by the result of the "democratic choice."[146] This argument is somewhat surprising with regard to illegitimate children, since in many if not most instances the children penalized by these statutes are too young to vote.[147]

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144 Speech, Catholic University, March 31, 1982, pp.17-19.

145 Id. at 19.

146 Id. at 18-19.

147 See e.g., Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 166 (1972) (illegitimate child born after the death of her father in 1967); Matthews v. Lucas, 427 U.S. 495, 497 (1976) (plaintiffs seeking social security benefits were 15 and 8 when their father

Judge Bork argued in this 1982 speech that the application of the Equal Protection Clause to groups other than racial minorities was merely the result of "fads in sentimentality."[148] Justice Powell explained the Supreme Court's actual reasons for carefully scrutinizing statutes which discriminate against children born out of wedlock:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth....

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

(4) Discrimination Against Aliens. The Supreme Court ordinarily applies to discrimination against aliens the strict scrutiny standard utilized for government actions that discriminate against race, although a less stringent standard is

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died); Jimenez v. Weinberger, 417 U.S. 628, 630 (1974) (plaintiffs were 5, 3, and 6 months when disputed social security benefits were sought on their behalf); Labine v. Vincent, 401 U.S. 532, 533 (1971) (plaintiff challenging state inheritance statute was 6 when her father died).

148 Speech, Catholic University, March 31, 1982, p.19.

utilized when a state limits certain important government positions to citizens. Ambach v. Norwich, 441 U.S. 68, 74 (1979). This strict scrutiny standard has been applied in a wide variety of contexts. Nyquist v. Mauclet, 432 U.S. 1 (1977) (discrimination in state educational benefits); Examining Board v. Otero, 426 U.S. 572 (1976) (statute forbidding aliens to work as engineers); In re Griffins, 413 U.S. 717 (1973) (prohibition against practice of law by aliens); Graham v. Richardson, 403 U.S. 365 (1971) (discrimination against aliens in welfare programs).

In his 1982 speech arguing that the Equal Protection Clause should be restricted to discrimination on the basis of race, Judge Bork specifically objected to interpreting the Clause to forbid discrimination against aliens.[149] Judge Bork's contends that groups other than racial minorities must rely on the electoral process to prevent government discrimination; under most circumstances, it should be noted, aliens cannot vote.

(5) Discrimination Against the Poor: Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). This decision held invalid the Virginia poll tax. Voters were required to pay the tax of $1.50 six months before the election in which they wished to vote. Registered voters who failed to pay the tax were removed from the rolls. Voters received no notice that the tax

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[149] Speech, Catholic University, March 31, 1982, p.19.

was due unless they owned sufficient property to be subject to the state personal property tax, in which case the poll tax was included in the property tax assessment. New registrants were required to pay a retrospective poll tax for previous years in which they had not paid the tax. 383 U.S. at 664 n.1. The Supreme Court held that the Equal Protection Clause forbade a state from denying the right to vote to "those unable to pay a fee to vote." 383 U.S. at 668. "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." 383 U.S. at 668. The Court expressly noted that the "Virginia poll tax was born of a desire to disenfranchise the Negro." 383 U.S. at 666 n.3.

At his 1973 confirmation hearing, Judge Bork testified that he believed that Harper was wrongly decided, at least with regard to the Equal Protection claim:

> Senator Tunney. Have you a position with respect to the correctness of the Supreme Court's decision in Harper v. Virginia Board of Elections, which held that the imposition of a poll tax was unconstitutional?
>
> Mr. Bork. I think I have, Senator. I am trying to cast my mind back on things I have written. I think I have previously indicated that that case as an equal protection case, seemed to me wrongly decided. It might have been decided the same way, and now we are getting into areas of speculation and theory more appropriate to my role as a professor.
>
> It seems to me a lot of these cases are really essentially republican form of government clause cases and maybe you can

uphold that decision on a theory like that rather than on an equal protection theory.

May I add, Senator, that was a case in which there was no evidence or claim of racial discrimination in the use of the poll tax. If there had been, of course, it would be properly an equal protection case and the result would have come out just the way it did.

Senator Tunney. How do you feel now about the decision. Do you think that as far as the welfare of the Nation is concerned, the Harper case was correctly decided?

Mr. Bork. I do not really know about that, Senator. As I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the nation one way or the other.[150]

In 1985 Judge Bork renewed his criticism of Harper:

[T]he Court frequently reached highly controversial results which it made no attempt to justify in terms of the historic constitution or in terms of any other preferred basis for constitutional decision making. I offer a single example. In Harper v. Virginia Board of Elections, 383 U.S.663 (1966), the court struck down a poll tax used in state elections. It was clear that poll taxes had always been constitutional, if not exacted in racially discriminatory ways, and it had taken a constitutional amendment to prohibit state imposition of poll taxes in federal elections. That amendment was carefully limited so as not to cover state elections. Nevertheless, the Supreme Court held that Virginia's law violated the equal

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150 Nominations of Joseph T. Sneed to be Deputy Attorney and Robert H. Bork to be Solicitor General: Hearings Before the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 5, 17 (1973).

protection clause....[151]

The poll tax as such is no longer an issue. The Twenty-Fourth Amendment forbade the use of a poll tax in federal elections. The three southern states which at the time of Harper applied a poll tax in state elections have now repealed them. Harper is of continuing importance, however, because it established that "[l]ines drawn on the basis of wealth or property, like those of race... are traditionally disfavored," 383 U.S. at 668, especially where they burden "fundamental rights and liberties." 383 U.S. at 670. First, a series of Supreme Court decisions following Harper have held that the states may not limit the right to vote to the owners of real property,[152] most recently in Hill v. Stone 421 U.S. 289 (1975), in which Justice Powell joined the 5 justice majority. See 421 U.S. at 294 (citing Harper).

Second, the Court has relied on Harper in holding that a state cannot require candidates to pay filing fees that exclude indigent candidates. Lubin v. Panish, 415 U.S. 709, 719 (1974) (citing Harper) (Justice Powell joined majority opinion); Bullock v. Carter, 405 U.S. 134, 142, 143 n.20 (1972) (citing Harper).

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151 R. Bork, "Forward," in G. McDowell, The Constitution and Contemporary Constitutional Theory, p.vii (1985).

152 Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. Houma, 395 U.S. 701; Kramer v. Union Free School District, 395 U.S. 621, 628 (1969) (citing Harper).

Third, the Court has held that a state may not limit public office holders to property owners. Turner v. Fouche, 396 U.S. 346, 362-64 (1970). Fourth, the principle established by Harper that the exercise of fundamental rights cannot be limited to the affluent has been applied to invalidate statutes which effectively prohibited the poor from getting married, Zablocki v. Redhail, 434 U.S. 374 (1978) (Justice Powell concurred), or divorced Boddie v. Connecticut, 401 U.S. 371, 389 (1971) (Douglas, J., concurring, citing Harper).

(6) Skinner v. Oklahoma, 316 U.S. 535 (1942). This decision struck down an Oklahoma statute that mandated surgical sterilization for any person convicted of three or more crimes "amounting to felonies involving moral turpitude." 316 U.S. at 536. Sterilization was neither required nor authorized if the felonies arose out of violation of "the prohibit[ion] laws, revenue acts, embezzlement, or political offenses." 316 U.S. at 537. The Supreme Court held that, because sterilization irrevocably destroyed a fundamental right, the courts should apply a "strict scrutiny" standard to any state imposing mandatory sterilization on a specific group of individuals:

> We are dealing here with legislation which involves one of the basic rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to

> the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the state conducts is to his irreparable injury.

316 U.S. at 541.

> Sterilization for those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination...If such a classification were permitted, the technical common law concept of a "trespass"...could readily become a rule of human genetics.

316 U.S. at 541-42.

Judge Bork, however, could see no constitutional objection to a law which sterilized pickpockets, but imposed no such penalty on white collar embezzlers or perpetrators of election fraud:

> All law discriminates and thereby creates inequalities. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as "fundamental" interests in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as Griswold v. Connecticut. Any case book lists them...Skinner v. Oklahoma...Shapiro v.

Thompson...Levy v. Louisiana....[153]

Although mandatory sterilization is today exceedingly rare, the principle established by Skinner, and rejected by Judge Bork, that a state must have extraordinary justification for classifications that burden family relationships, has been reiterated in a long and important series of cases. In Zablocki v. Redhail, 434 U.S. 374 (1978), the Supreme Court, citing Skinner, struck down a state law that prohibited certain individuals from marrying solely because they were poor; Justice Powell, also citing Skinner, concurred. 434 U.S. at 398. In Moore v. East Cleveland, 431 U.S. 494-499, (1977), a decision citing Skinner and written by Justice Powell, the Supreme Court held that a city could not make it a crime for a grandmother to live with her grandchildren. In Cleveland Board of Education v. La Fleur, 414 U.S. 632, 640 (1974), the Supreme Court, citing Skinner, held that a city could not lay-off a female teacher solely because she was pregnant. In Boddie v. Connecticut, 401 U.S. 371, 376 (1971), the Supreme Court held that a state could not, by requiring payment of court fees beyond the reach of indigent individuals, deny indigent estranged couples the right to divorce, and thus to remarry.

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153 Robert Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 11-12 (1971).

Shapiro and Levy are discussed elsewhere in this report.

(7) Reynolds v. Sims, 377 U.S. 533 (1964). Reynolds v. Sims established the familiar one-person-one-vote rule, which requires that the districts from which state or local officials are elected contain an equal population. Prior to Reynolds there were often enormous variations in the population of legislative districts within a state, and a small minority of voters could elect a majority of the state legislature. Virtually all presently existing district lines have now been drawn to meet the one-person-one-vote requirement. Justice Powell has expressly endorsed that requirement. Ball v. James, 451 U.S. 355, 373 (1981) (concurring opinion); Chapman v. Meier, 420 U.S. 1 (1975).

Judge Bork has repeatedly disagreed with Reynolds v. Sims, arguing that wide differences in the size of districts, and in the weight accorded to the votes of different individuals, should be permitted.

In 1968 he criticized the Warren Court for adopting the one-person-one-vote rule:

> [O]n no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed. What the Court in effect decided was that all state legislatures, including both houses of bicameral legislatures, must be apportioned on a population basis -- "one-man-one-vote" -- regardless of political, geographic, or historic considerations, or the analogy to the federal Congress, or any other factors

> that might suggest to the voters themselves the wisdom of some weighting of representation.
>
> Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a supporting argument. They contain little more than a passionate reiteration that equal protection of the laws must mean equal weight for each vote... [T]he "one-man-one-vote" rule, far from being an application of the Fourteenth Amendment, ran counter to the text of the amendment, the history surrounding its adoption and ratification, and the political practice of Americans from colonial times onward....
>
> Justice Stewart's dissent suggested the lines along which a restrained Court might have dealt with the problem of malapportioned legislatures. He would have approved any rational plan that did not permit the systematic frustration of the majority will.[154]

Again in 1971 and 1973 Judge Bork rejected the one-person one-vote rule, and called for approving any rational districting plans that would not permit "the systematic frustration of the will of a majority of the electorate."[155]

In a 1982 speech at Yale, Judge Bork urged that the reapportionment cases should have been decided under the Republican Form of Government Clause, and suggested that any

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154 Robert Bork, "The Supreme Court needs a New Philosophy," Fortune, December, 1968, pp.166-168.

155 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 18-19 (1971); 1973 Confirmation Hearing, p.13 ("I think 'one man, one vote' was too much of a straight jacket. I do not think there is a theoretical basis for it.")

districting plan would be constitutional so long as a majority of the voters had approved the plan and had the authority to alter it:

> I do not know why one must assure change for its own sake anyway, but the idea of allowing local majorities to govern, which is what Justice Stewart would have allowed in the Colorado case -- "Show me that the majority can reapportion and I will allow almost any reapportionment that a majority chooses" -- is fine, but all you are talking about there is a court that keeps democratic processes open and that really could act under the Guarantee Clause.... The Republican Form of Government Clause is really the clause they ought to have addressed in those cases.[156]

In a 1985 interview Judge Bork indicated that the mere possibility that a majority could reapportion would be sufficient, regardless of whether the plan at issue had not in fact been adopted or approved by a majority of the voters:

> [S]ince the United States is required to guarantee to the states a republican form of government the judiciary could have used that to effect a kind of incorporation [of the Bill of Rights].
>
> Justice Stewart suggested something like that in the reapportionment case, Lucas v. Colorado General Assembly, that instead of going to the Equal Protection Clause and just applying it and saying one man, one vote, that we go, in effect, and require a showing that the majority is capable of reapportioning. If they are capable through

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156 Speech, The Federalist Society, Yale University, April 24, 1982, pt.2, pp.4-5.

> a convention or through referendum, then if they come up with a result that cannot be said to be irrational, he (Stewart) would approve it. Obviously, in a case like Baker v. Carr, where a majority was powerless to reapportion, I would think that the inability of the majority to rule at all would be a denial of the republican form of government.[157]

In 1987 Judge Bork reiterated his objection to the one-person, one-vote rule:

> In Baker against Carr... the Court was right to step in. I wish it had followed the route that Justice Stewart laid out in the Colorado case -- Lucas against the General Assembly -- which is to say, "Show me that a majority can reapportion periodically, and I will approve almost any reasonable or rational result," which is to say "Just show me that the majority can reapportion."
>
> I think this Court stepped beyond its allowable boundaries when it imposed one man, one vote under the Equal Protection Clause. That is not consistent with American political theory, with anything in the history or the structure or the language of the Constitution.[158]

Justice Stewart himself long ago abandoned this rational basis test, and accepted the one-person one-vote principle. See, e.g., Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973). But the circumstances of Justice Stewart's original dissents are an indication of the degree of

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157 Unedited transcript of an interview with Judge Bork for California Lawyer Magazine, January 24, 1985, pp.7-8.

158 Worldnet Interview, June 10, 1987, pp.22-23.

malapportionment which Judge Bork regarded as acceptable. In his since recanted dissent in WMCA v. Lomenzo, 377 U.S. 663, 744-65 (1964), in which Justice Stewart first proposed that standard, Justice Stewart would have upheld districting plans in New York and Colorado under which barely one-third of the electorate could have elected a majority of the state legislature. WMCA v. Lomenzo, 377 U.S. at 647-48; Lucas v. Colorado General Assembly, 377 U.S. 713, 729 (1964). In Colorado the votes of some voters were worth 3.6 times as much as the votes of others, Lucas, 377 U.S. at 728; in New York the votes of some voters were worth 21 times as much as the votes of others. WMCA, 377 U.S. at 648. Disparities of this magnitude were deemed acceptable under the rational basis rule advocated by Judge Bork.

If the Supreme Court were to overrule the one-person-one-vote rule, the consequences would be immediate and drastic. Although most states, in order to comply with the one-person one-vote rule, have enacted statutes which establish equitable districting plans, those districting plans often violate the state's own constitution, which mandates severe malapportionment. See, e.g., Reynolds v. Sims, 377 U.S. at 538-39 (Georgia Constitution); WMCA v. Lomenzo, 377 U.S. at 637-38 (New York Constitution); Maryland Committee v. Jawes, 377 U.S. 656, 665 (1964)(Maryland Constitution); Rotman v. Sincock, 377 U.S. 695, 698 (1964)(Delaware Constitution); Lucas v. Colorado General Assembly, 377 U.S. at 716-18 (Colorado Constitution). Where such

state constitutional requirements exist, any existing one-person one-vote plan could be overturned on state law grounds if the requirements of Reynolds v. Sims were removed. Where state constitutions do not mandate any particular form of malapportionment, the rational basis standard would provide an enormous opportunity for partisan and other forms of gerrymandering.

I. RIGHT TO TRAVEL

(1) Shapiro v. Thompson, 394 U.S. 618 (1969). This decision struck down several statutes which rendered ineligible for public assistance any family that had been in a state for less than a year. The practical effect of such statutes was to prohibit families in need of public assistance from moving into certain states, since for a full year after leaving the state of origin they would be unable to pay for the bare necessities of life. The Supreme Court, relying on decisions dating from 1849, held that citizens had an inherent constitutional right to travel throughout the United States. 394 U.S. at 630-31. The Court concluded that distinctions between long term residents and recent immigrants burdened that right to travel, and could only be upheld if justified by "a compelling governmental interest." 394 U.S. at 634 (Emphasis in original). Judge Bork, in the passage quoted in the discussion of Skinner, asserted that Shapiro was incorrectly decided.

The principle established by Shapiro, that a state may not ordinarily impose a less-favored status on recently arrived but bona fide residents, has been applied by the Supreme Court in a wide variety of situations. Attorney General of New York v. Soto-Lopez, 90 L.Ed. 2d 899 (1986) (declaring unconstitutional a statute limiting veterans' preference to veterans who were residents of the state when they entered military service)

(citing Shapiro) (Justice Powell joined the plurality opinion); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (declaring unconstitutional a state law denying tax exemption to veterans who moved into state after May, 1975) (citing Shapiro) (Justice Powell did not participate); Zobel v. Williams, 457 U.S. 55 (1982) (declaring unconstitutional a statute basing amount of distribution of state funds on the number of years recipient lived in the state) (citing Shapiro) (Justice Powell joined concurring opinion); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1074) (declaring unconstitutional a statute denying to residents of less than 12 months the free non-emergency medical care provided to indigent longer term residents) (citing Shapiro) (Justice Powell joined the majority opinion); Dunn v. Blumstein, 405 U.S. 330 (1972) (declaring unconstitutional a one year residency requirement for new voters) (citing Shapiro) (Justice Powell did not participate).

J. COMMERCE CLAUSE

(1) Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). The question at issue in this case, as in National League of Cities v. Usery, 426 U.S. 833 (1976), was whether the minimum wage provisions of the Fair Labor Standards Act could constitutionally be applied to state and local government employees. In Usery the Supreme Court held, by a 5 to 4 margin, that the statute, insofar as it applied to certain government workers, was unconstitutional because it infringed on the authority of the states to structure their internal operations and allocate their own resources. In Garcia the Court reversed itself and upheld the application of the Fair Labor Standards Act to state and local government bodies. The Reagan Administration, it will be recalled, although responsible for enforcing the Act, denounced the decision in Garcia in particularly harsh terms.

Judge Bork, then Solicitor General, personally argued Usery on behalf of the United States, and urged that the statute be held constitutional. That argument did not, of course, necessarily reflect his personal views, since the Department of Justice traditionally defends the constitutionality of any act of Congress unless its invalidity is undeniable. In 1982, when Usery was still the law, Judge Bork announced that he agreed with the majority in Usery, expressing regret only that the Supreme

Court did not go further in limiting the authority of Congress:

> Despite my professional chagrin, I agree at least with the impulse that produced the result in National League of Cities v. Usery, the case which I lost, which was the invalidation of the amendment to the Fair Labor Standards Act that applied wages and hours provisions to the employees of state and local governments. But I doubt that the case has much generative potential. I doubt that it does more than express an impulse because there is no doctrinal foundation laid in the case for the protection of state rights or state powers...
>
> The opinion, as you know, by Justice Rehnquist, claims that it is one thing for the federal government to displace a state's laws on particular subjects but quite another to regulate the state's activities themselves. Now that distinction, if it is one, is unrelated to the concerns of federalism because it is entirely possible to strip a state of all of its sovereignty either way, either by regulating the state itself or by displacing its policy making function with federal law.[159]

Garcia overruled Usery in 1985. The next year Judge Bork reiterated his support for Usery, and argued that Usery had failed to survive because judges had not been sufficiently activist in attacking the authority of Congress to legislate in areas that affected state sovereignty:

> Looking back, it seems that National League of Cities v. Usery was correctly decided. Its weakness, which proved fatal, lay in the

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[159] Speech, Federalist Society, Yale University, April 24, 1982, pt.1, pp.2-3.

> opinion's insistence that what one court did was consistent with all prior precedent and in its attempt to draw distinctions that seem dubious. That made the decision vulnerable and subject to attack on its own terms. If federalism is to receive judicial protection, I think courts will have to admit that bright-line tests are unavailable, that prior cases are irreconcilable, and that decisions will turn on such matters as the degree of federal intrusiveness and the vitality of states as policy makers. Perhaps a presumption can be established against federal invasions of areas traditionally reserved to the states. Perhaps other, subsidiary criteria can be developed. Would this be unacceptable judicial activism? Perhaps not. There is nothing wrong with judges being active in the defense of real constitutional principles. Activism in its unfortunate form occurs when judges create constitutional principles or move well beyond the allowable meaning of an actual principle. Federalism is, of course, a basic constitutional principle and it is appropriate that its core be defended.[160]

The significance of this proposed judicial activism to restrict the authority of Congress extends far beyond the Fair Labor Standards Act. In a wide variety of areas Congress has enacted legislation to deal with domestic problems which the states have failed to resolve, and has required the states to adhere to the same standard of conduct applicable to private individuals and organizations. Both the states and private parties have sought, until now with little success, to attack this federal legislation as inconsistent with "federalism." In

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[160] Speech, Attorney General's Conference, January 24-26, 1986, pp.10-11.

Hodel v. Virginia Surface Mining Association, 452 U.S. 264 (1981), mining companies alleged that the Surface Mining Control and Reclamation Act of 1977 violated the Tenth Amendment rights of the states. In EEOC v. Wyoming, 460 U.S. 226 (1983), the state of Wyoming, relying on Usery, insisted that the Age Discrimination in Employment Act could not constitutionally be applied to the states. Although both statutes were upheld, the latter by a vote of only 5 to 4, these constitutional challenges are indicative of the types of problems that would doubtless arise if the Supreme Court were to follow Judge Bork's call for judicial activism to defend his view of federalism.

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September 14, 1987

Senator Joseph Biden
Chairman, Senate Judiciary Committee
United States Senate
224 Dirksen Office Building
Washington, D. C. 20510

Attention: Diana Huffman

Dear Senator Biden:

Please find enclosed the statement of the Physicians Forum on the pending nomination of Judge Robert Bork to the United States Supreme Court. We are very concerned about the possible ramifications of the Bork nomination and, as Dr. Peter Orris indicated to Debbie in their telephone conversation, we are available to give oral testimony if you so desire.

Please contact Dr. Patricia R. Bush at (312) 633-7292 if you have any questions, need further clarification, or wish to schedule oral testimony.

Sincerely,

Linda R. Murray

Linda R. Murray, M.D., M.P.H.
President
Physicians Forum

LRM/PRB/bl

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STATEMENT ON THE BORK NOMINATION

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The Physician's Forum is a group of health care practitioners who have fought for over forty years for an equitable distribution of health care resources and to assure that every American regardless of their socioeconomic status has access to health care services that are acceptable as well as affordable. We oppose the nomination of Robert Bork as Justice of the United States Supreme Court. As the oldest professional health care group of its kind in the United States, we are concerned that his prior decisions have seriously compromised our ability to protect the occupational, environmental and reproductive health of our nation and have favored the financial interests of companies over the health and well-being of our citizenry. His views on the rights of women and minorities are particularly troublesome.

In the field of occupational health, Judge Bork's decision in **Chemical & Atomic Workers' International Union vs American Cyanamid** that the employer's "fetus protection policy" could not be challenged under OSHA's general duty clause gave women exposed to toxic levels of lead the unenviable option of quitting their jobs or being sterilized. In **Prill vs NLRB** he allowed a driver to be fired for questioning the safety of a vehicle that had previously been involved in an accident. In **Simplex Time Recorder vs Secretary of Labor** Judge Bork affirmed, after a fatal fire, a ruling that the company had not "seriously" violated the OHSA by failing to maintain sufficient protection against fires in the workplace. He also wrote a minority opinion declaring that the commercial interests of a CAT scan manufacturer outweighed the

health interests of hospital workers and patients (**Greenberg vs FDA**).

In **Natural Resources Defense Council vs EPA** concerning environmental health, Judge Bork allowed the elimination of EPA regulations under the Clean Air Act and the resulting vinyl chloride pollution because he decided that the regulation imposed "unreasonable" costs to the industry. He also denied citizens in California a hearing to determine the hazards of licensing a nuclear power plant in an active earthquake zone (**San Louis Obispo Mothers for Peace vs NRC**).

Other decisions by Judge Bork have permitted "junk food" in schools and allowed untested and potentially harmful chemicals to remain in the marketplace. He has consistently ruled for the government against citizens and for business against the government and has even questioned the validity of "one man, one vote".

Judge Bork has used the theory of "original intent" to denigrate the right to privacy. He has stated that the Supreme Court decisions establishing this right are in error. He has indicated that, given the chance, he would overturn **Roe vs Wade**, ignoring established precedent. He opposes homosexual rights and in **Dronenburg vs Zech** rejected the idea of a right to private consensual homosexual activities stating that "no court should create new constitutional rights". This is particulary disconcerting in light of the Ninth Amendment to the Constitution's express statment that "the enumeration in the Constitution of certain rights shall not be construed to deny

or disparage others retained by the people". American citizens, in accordance with our constitution, do have rights other than those expressly named. His rejection of a constitutional right to privacy is particulary alarming given that the privacy right forms the basis of informed consent and the physician-patient relationship. This right will also be used to determine the constitutionality of pending legislation at the state level concerning AIDS.

The theory of "original intent" obviates 200 years of political, social and scientific knowledge. Our constitution was meant to be a living document, not a stagnant record. The health status of America has been improved by constitutional decisions cognizant of the widening responsibility of government in the protection of the public's health. As health care providers, we know that retrenchment on these gains, hard fought and won over many years can only be detrimental. Reliance on "original intent" and judical restraint would deny us Supreme Court rulings on corporate responsibility for environmental pollution and occupational hazards, abortions, civil rights and others that form the cornerstone of public health policy and principles.

The Physician's Forum urges the Senate to exercise fully its duty to "advise and consent" on Supreme Court appointments and reject the Bork nomination.

September 14,1987

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ptember 16, 1987

Hon. Joseph Bider
Senate Judiciary
224 Dirksen
Senate Office Bui
Washington, D.C.

Dear Senator Bide

On behalf of Catherine G. Roraback and myself I write this letter to clarify the legal situation as it existed in Connecticut prior to the decision in Griswold v. Connecticut. There is a decision of the Connecticut Supreme Court of Errors dated March 6, 1940 a copy of which is enclosed. You will note that there was a prosecution of two doctors and a nurse as violating the Connecticut statute against the use of contraceptives. This case did not go beyond the highest court in Connecticut. However, as a result of this decision the nine Planned Parenthood clinics which had been providing contraceptive services until then were closed and remained closed until the decision of the United States Supreme Court in Griswold v. Connecticut in 1965. During the intervening period efforts were made to bring the question of the constitutionality of the Connecticut Statute to the United States Supreme Court. Although that Court did grant review in two cases prior to Griswold, they decided against the opponents of the statute on technical grounds. In the second of such cases, there were dissents from the denial to pass upon the statute by a leading "conservative" Justice and a leading "liberal" Justice. Both Justice Harlan and Justice Douglas dissented in separate findings stating that in their view the Connecticut statute violated a basic constitutional right of privacy, a position which the majority of the court adopted in the Griswold case in 1965.

The citations of State v. Nelson Goodrich, etc. are 126 Conn. 412 and 11 Atlantic 2nd 856. The citations for the Tileston case are 129 Conn. 64, 26 Atlantic 2nd 582 and, 318 U.S. 44. - the second case.

The citations of the third case, Coe v. Ullman 367 U.S. 497 and the citation for the Griswold case is 381 U.S. 479.

Catherine Roraback represented the Planned Parenthood League of Connecticut from 1955 on and I have represented the Planned Parenthood federation of America since before 1940. From 1940 until the decision in the Griswold case in 1965, no birth control services were available to Connecticut women who could not afford the price of a private physician.

We will be happy to supply any additional data.

Yours,

Harriet F. Pilpel
For Catherine G. Roraback and herself

Statement by

Faye Wattleton, President

Planned Parenthood Federation of America

Submitted to the Judiciary Committee

United States Senate

on the nomination of Judge Robert H. Bork

to the United States Supreme Court

October 5, 1987

Mr. Chairman. Planned Parenthood Federation of America is the nation's oldest and largest private provider of reproductive health care in the United States. For more than 70 years we have advocated for the right of all men and women to have access to the information and medical care that enables them to decide whether and under what circumstances to bear children.

We are advocates, but we are also — principally — service providers. Each year more than 2.4 million Americans, most of them young and most of them poor, find their way into our health centers for contraception or other reproductive information and services to enable them to make the most basic and private decisions about their lives and their families.

In all these many decades of advocacy, Planned Parenthood has never taken a position on the appointment of a Supreme Court justice. As a non-partisan organization supported by hundreds of thousands of volunteers and donors from all parts of the political spectrum, we have steered clear of choosing between candidates and nominees and adhered closely to our basic organizational mission. Nevertheless, on August 1, PPFA's Executive Committee met in New York and voted to publicly expose its disagreement with President Reagan's nomination of Judge Robert H. Bork to serve on the U.S. Supreme Court, and to oppose his confirmation by the Seante. The vote was unanimous.

That is why we appear today. We come not as lawyers or legal scholars, as so many have. We do not bring to the committee an ideology or an overriding legal framework for opposing the Bork nomination. We are here as part of our continuing commitment to millions of men and women and families in this country and overseas. It is these "real people," as Sen. Heflin so aptly noted, who stand to win or lose from decisions in the courts.

Based on what we know about Judge Bork's judicial outlook and temperament, his philosophical rigidity, his preoccupation with judicial theory even at the expense of human justice, his trivialization of the fundamental right to privacy and his obeisance to legislative enactments, we believe millions of "real people" stand to lose a great deal if Judge Bork's nomination to the Supreme Court is not stopped.

Judge Bork's narrow view of the Constitution, which he says fails to address conflicting "gratifications", leaves to the whims of legislatures so many issues that have no place in political debate, and which, when left to the majority, often are addressed at the expense of the minority.

In his Indiana Law Journal article written in 1971, and cited so frequently during these hearings, Judge Bork seems both to recognize the problem and to dismiss it as of no consequence. He acknowledges that:

> Majority tyranny occurs if legislation invades the areas properly left to individual freedom.

But then he goes on to call the Griswold decision, which struck down a Connecticut statute that made the use of contraceptive devices by married couples a criminal act, "an unprincipled decision" and "utterly specious."

In Judge Bork's mind, Griswold was about competing claims to power or "gratification" between a majority and a minority. In fact, Griswold struck down a law that affected everyone who used or wanted to use contraception, but which in practice made a distinction between those resourceful enough to evade the law and those whose poverty doomed them to observe it.

"Real people" in Connecticut who could afford it either left the state or broke the law by conspiring with their private physicians to obtain contraceptive devices that were "sold for the prevention of disease." Others obeyed the law because they could not afford to do otherwise.

Most Americans would see that as inherently unfair and ultimately unworkable. Judge Bork seems to see it as merely "interesting," as though he were commenting on a tennis match or a stimulating chess game. His detachment from the human consequences of his doctrinaire views may make him a curiosity in the classroom, but could create a monster in the highest court. His attempt to dismiss Griswold is indicative of his insensitivity to human need. The judge doesn't recognize the role of the court which most Americans consider to be its central purpose: that of correcting the transgressions of the legislative branch as they intrude upon the liberties and freedoms of the individual. Thus in the Indiana article Bork writes:

> In Griswold a husband and wife assert that they wish to have sexual relations without fear of unwanted children. The law impairs their sexual gratifications. The state can assert, and at one stage in that litigation did assert, that the majority finds the use of contraceptives immoral. Knowledge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications.
>
> The electrical company asserts that it wishes to produce a electricity at low cost in order to reach a wide market and make profits. Its customer asserts that he wants a lower cost so that prices can be held low. The smoke pollution regulations impair his and the company's stockholders' economic gratifications.
>
> Neither case is covered specifically or by obvious implication in the Constitution. Unless we can distinguish forms of gratification, the only course for a principled Court is to let the majority have its way in both cases. It is clear that the court cannot make the necessary distinction.... Why is sexual gratification nobler than economic gratification?

It is hard to imagine a more insensitive approach to the law. And it is clear that Judge Bork's willingness to rationalize coercive intrusions into personal privacy through arcane legal hair-splitting would endanger the rights of all Americans, were he to become an associate justice of the Supreme Court.

The "real people" view from Connecticut prior to Griswold was startlingly simple. In the mid-nineteenth century, Connecticut and a number of other states passed what were called the Comstock laws which made abortion illegal for the first time and restricted information and publications relating to birth control. Amended over the years, the Connecticut law became one of the most restrictive because of its prohibition on the use, as well as the dispensing or promotion, of contraception. Enforcement was spotty, but from time to time state authorities did invoke the law to close down or intimidate doctors from making available to families those forms of contraceptives that were readily available in neighboring states.

In his testimony before the committee, Judge Bork called the Connecticut contraceptive laws "nutty," but went on to say that they were not enforced against married couples and were only used to regulate clinics. To our knowledge it is true that no one went to jail for using contraception. It is also clearly true that thousands of women who wanted contracetpion could not obtain it because of the laws, except by going out of state or by breaking the law. In 1939, the law was used to close down nine Planned

Parenthood clinics in the state there were providing birth control information to poor women -- and those clinics remained closed for most the 25 years prior to the Griswold decision.

Bork acknowledged in his testimony that the law had "only" been enforced against clinics. He failed to recognize that enforcement of such laws against providers effectively strips individual consumers of their constitutional rights. The Supreme Court has recognized this in a long line of decisions giving physicians and other providers standing to raise the privacy claims of their patients. Griswold, Roe.

In State v. Nelson, Goodrich, et al in the Connecticut state courts, a nurse and two doctors were arrested in connection with the closing of the clinics. In the aftermath of that action, Planned Parenthood operated essentially as a shuttle service -- assisting women who needed help, in getting out of state to New York, Rhode Island or elsewhere.

Apart from the general inconvenience and absurdity of the law, poor women were its particular victims. Low-income women could not afford to take half a day off to travel 100 miles to visit a birth control clinic. They could not afford a private relationship with a physician who, "to prevent veneral disease," would prescribe diaphragms and condoms and other devices that were available at the time for preventing unwanted pregnancies. In Connecticut prior to Griswold, the rich practiced birth control and the poor were supposed to practice "self control."

Judge Bork has also shown his insensitivity to privacy rights in the area of forced sterilization. In his Indiana Law Journal article, he criticized as "improper and as intellectually empty as Griswold" the Supreme Court's 1942 decisions in Skinner v. Oklahoma. In that case, the Supreme Court struck down as a violation of the equal protection clause of the Fourteenth Amendment an Oklahoma statute which provided for the sterilization of habitual criminals, defined as persons convicted of crimes involving "moral turpitude." The state authorized the sterilization of robbers and burglars but expressly exempted embezzlers. Pointing out that the legislation involved "one of the basic civil rights of man," the Court declared this arbitrary classification unconstitutional.

In Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co., Judge Bork ruled on a policy of a manufacturing plant that required women employees of childbearing age to lose their jobs in one of the company's departments (where there were lead levels that could damage fetal tissue) unless they were surgically sterilized.

The Secretary of Labor charged that this policy violated the Occupational Saftey and Health Act, which requires every employer to furnish "to each of his employees employment and a place of employment which are free from recognized hazards." Writing for the Court of Appeals for the District of Columbia Circuit, Judge Bork found that because the legislative history cited such examples of "hazards" as poisons, combustibles and the like, the "fetus protection policy" was not a "hazard." In his testimony before this Committee, Judge Bork defended this decision because it "gave women a choice," displaying a total lack of concern for women who might have been (and in fact were) forced by economic necessity to submit a surgery, ending forever their basic and fundamental right to have children.

Judge Bork has been equally indifferent to the actual circumstances evolving out of the 1973 Roe v.Wade decision, which he scornfully denounced as unconstitutional and a "judicial usurpation of state legislative authority." Roe, like so many other decision affirming the reproductive rights of Americans, flows out of the privacy doctrine established in the Connecticut case. Judge Bork has stated that both were outrageous and that no general right of privacy exists since it is not clearly mentioned in the Constitution.

The Constitution could not address itself specifically in the 1780's to matters of contraception as we know it, nor to other developments flowing out of social and technological change.

Nevertheless, abortions was always available. Like contraception in Connecticut prior to Griswold, access to illegal abortion was mostly a function of money and connections. But even affluent women found themselves victimized in the abortion underworld prior to Roe.

Thus, the issue in Roe was not whether abortion would be made available but whether its existing availability would be protected under the privacy doctrine, enabling the states to regulate legal abortion to insure safety and enforce reasonable medical standards. The states were slowly moving the same way.

By the time of Roe 17 states had liberalized their laws in recognition of the widespread reliance upon abortion and, no doubt, acknowledging that Americans had a basic right to privacy that extended to decisions about childbearing.

Without Roe, however, access to abortion would today be a function of geography and economic circumstance. In 1972, the year before the Supreme Court's decision, over 116,000 women left their own states to obtain abortions in New York City alone.

Given Judge Bork's predilection for letting state legislatures work their will, it should be noted that 19 states have, in the 14 years since Roe, and in spite of it, repeatedly indicated a willingness to pass laws to limit access to abortion services.

Sixteen of those states — Idaho, Indiana, Massachusetts, Minnesota, Rhode Island, South Dakota, Illinois, Louisana, Missouri, Nebraska, Nevada, Pennsylvania, Utah, Arizona, Georgia and New Mexico — have taken specific steps to pave the way for making abortion illegal once again, when and if the courts allow. Voting for anti-abortion bills that legislators know will never become law has become a favorite pastime in many state capitols.

If one is to take Judge Bork's diatribes about the Court's abortion decision at face value, one has to presume that he would, given a chance, vote to restore the chaos and inequity that state legislature in their doubtful wisdom have favored. Ironically, state initiatives over the last several years that asked voters to restrict access to abortion for segments of the population (poor women relying upon public funding) or to declare in principle that abortion is wrong have failed in all but one case.

There is a gap between popular democracy and the representative democracy of legislative bodies which Judge Bork holds sacrosanct. In all, 22 states have passed a total of 39 resolutions critical of Roe, while public opinion surveys have consistently shown overwhelming public support for the Court's decision and opposition to reversing it. The courts are supposed to protect us from the legislative majorities, not hand us over to them.

Judge Bork's attacks on what he calls an undefined or general right to privacy fail to distinguish between protection of individual decision-making and private acts that are overtly harmful to another party.

In his testimony and writings, he has lumped the right to birth control or abortion with the right to sexual involvement with a consenting minor and to private use of heroin -- arguing that the general right to privacy developed by the courts fails to distinguish among these and other private acts. But it is precisely the role of the courts to try to distinguish between them, drawing on the statutes passed by legislative bodies, constitutional principles and precedents and the common sense knowledge that victimless acts are distinct from those that are harmful to another party or to oneself.

In spite of Judge Bork's reverence for the legislative process, it is to the judiciary that the people turn ultimately for justice and protection. A move by the president that is abusive or unpopular can be reversed by the Congress or the courts. Overreaching by the Congress or legislative bodies can be vetoed by the chief executive or struck down by the courts.

But decisions of the Supreme Court are subject only to congressional reversal -- and then in only the most limited and difficult process, through constitutional amendment or, occasionally, statutory clarification. The power that Judge Bork sees as a threat to liberty has been, in fact, for most of us a shield against legislative and executive tyranny.

There is room in the Congress and in the Executive Branch for extreme, provocative views. Strong arguments by well-informed and articulate extremists can be valuable as part of the mind-stretching process that leads to the development of a consensus. But extremism on the Supreme Court poses a danger of disruption and imbalance.

Judge Bork's academic explorations and novel theories may be appropriate for a legislative body, particularly since then he would then be subject to regular re-evaluation by an electorate.

Judge Bork's views and principles are even appropriate, it seems, for an intermediate judicial setting, since there at least remains the opportunity for review and reversal. But Judge Bork's judicial radicalism and ideology are out of the mainstream. They pose a threat to the stability and continuity that the American people reasonable expect from the Supreme Court of the United States.

Judge Bork should not be confirmed.

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THE QUESTIONABLE ROLE OF THE AMERICAN BAR ASSOCIATION IN THE JUDICIAL SELECTION PROCESS

by Daniel J. Popeo and Paul D. Kamenar

Article II of the Constitution vests the nomination and appointment of federal judges in the hands of the President, with the advice and consent of the Senate. Strictly speaking, Article II, sec. 2, cl. 2, provides only for the nomination and appointment of "Judges of the Supreme Court." The lower federal courts are creatures of Congress, and it has been suggested that appellate and district court judges may be considered "inferior officers" under Article II.[1] Consequently, Congress could vest the appointment of such officers or judges under Article II "in the President alone, in the Courts of Law, or in the Heads of Departments." However, the legislation creating the lower courts provides that those judges be appointed by the President, by and with the advice and consent of the Senate, just as Article II requires for Supreme Court justices.[2]

Nowhere, of course, is there any mention in the Constitution or any statute of the American Bar Association in the judicial selection process. Yet the ABA, an unincorporated trade association to which less than half of all of the American lawyers belong, has been allowed since 1952 by whatever Administration is in office, to screen or evaluate almost every judicial candidate long before the candidate's name reaches the President's desk, if it ever does.[3] Consequently, the power that the ABA has been allowed to wield through its Standing Committee on Federal Judiciary, is tantamount to providing this private special interest group with a virtual vetō power exercised against those judicial candidates the ABA regards as unfit or unqualified for judicial office.

This chapter will review the ABA's quasi-official role in the judicial selection process and reveal certain aspects of the secre-

tive process used by the ABA to thwart the nomination of conservative judicial candidates. In addition, this chapter will briefly discuss why the ABA's role in the judicial selection process is in violation of the Federal Advisory Committee Act.

While the ABA attempts for the most part to project an image of itself as an independent professional organization that objectively evaluates the qualifications of judicial candidates, the shocking reality is that the Committee and its members allow their liberal biases and the special interests of the ABA to affect the process, through activities ranging from working secretly with liberal public interest group to investigating the candidate's religious beliefs. The evidence demonstrates that the ABA has applied a subtle political litmus test to the detriment of conservative judicial candidates under consideration by the Reagan Administration. Before specific instances of ABA bias and conflicts of interest are described, it is helpful first to understand how the ABA evaluation process generally functions.

The ABA Standing Committee on Federal Judiciary consists of fourteen members—two members from the Ninth Circuit, one member from each of the other eleven federal judicial circuits and one member-at-large—all of whom are appointed by the President of the ABA rather than through any election procedure. The members serve for three years on staggered terms. On occasion, past Committee members may be called upon by the chairman and pressed into service to assist the current membership.

At best, the fate of a prospective judicial nominee lies in the hands of the fourteen voting members. During the crucial, initial (or investigatory) stage, the fate of the prospective nominee is actually in the hands of only two members—the member of the circuit in which the judicial vacancy occurs and the Committee chairman. At this so-called "informal" screening stage, the circuit member and the chairman receive the candidate's name and his comprehensive ABA-designed Personal Data Questionnaire from the Department of Justice. The circuit member then investigates what the ABA calls the candidate's "competence, integrity and temperament"[4] by conducting thirty to sixty confidential interviews in the legal community, including representatives of liberal public interest groups, individual attorneys and judges.

After the initial investigation, the circuit member prepares an informal written report for the Committee chairman. Based on this report, which may contain unsubstantiated allegations from the candidate's enemies, the chairman ventures a guess as to how the whole Committee would rate the prospective nominee. The four possible ratings are "not qualified", "qualified", "well qualified" and "extremely well qualified."[5] These ratings are ambiguously defined by the ABA, which produces arbitrary interpretation and application.[6] For example, during the confirmation hearings in 1984 of J. Harvie Wilkinson for the Fourth Circuit, Frederick G. Buesser, Jr., then Chairman of the ABA Committee, testified that he rated Professor Wilkinson merely "qualified" (the lowest of the three qualified ratings) "because, as I have said in my several letters, I believe that he has the capacity to become an outstanding appellate court judge. He was *remarkably well qualified* for that kind of work . . ."[7] Oddly, in ABA jargon, "remarkably well qualified" means something *less* than "well qualified." Perhaps this discrepancy is explained by a recent revelation by the Committee chairman that "well qualified" is reserved for those candidates whom the Committee would have chosen as *its* nominee for the position.[8]

The chairman's educated guess is then secretly forwarded to the Attorney General's office, but the details that underlie the basis of the guess are not always disclosed. In effect, an unidentified source can level unsupported allegations for personal or philosophical reasons against a prospective nominee and be fully protected against libel or slander, while denying the nation a qualified jurist. Indeed, the ABA proudly admits that it seeks input from the candidate's adversaries without indicating that the expected critical comments are in any way discounted considering the source.[9]

If the chairman anticipates (based on the informal report) that the candidate is "not qualified," this almost always is fatal to the formal nomination. If the prospective nominee is given an anticipatory rating of "qualified" with some reservations, he may have an opportunity to answer the charges or objections against him in a meeting with some Committee members before the full vote of the committee is taken to determine the final rating. However, the prospective nominee whom the chairman anticipates will be rated "not qualified" may never get a chance to

respond to the Justice Department concerning adverse or vague allegations of misconduct. As Edward C. Schmults, former Deputy Attorney General, revealed in 1984 to the Senate Judiciary Committee: "At another meeting again on a Saturday morning, I met . . . with four members of the ABA committee and they outlined their concerns about a candidate the Department was considering. I agreed with them that their concerns were disqualifying and stated at the meeting that the administration would not proceed with the candidate. Another candidate was selected."[10] Thus, the ABA is able to derail a nomination even before the full Committee has an opportunity to formally vote and rate the candidate.

If the preliminary rating is "qualified" or better, the investigation is completed and a formal or final report is prepared by the circuit member in charge of the investigation.[11] The written formal report containing a summary of the interviews and investigation and the candidate's Personal Data Questionnaire, are then sent to each Committee member. After examining the report, each member transmits his vote to the chairman. If questions are raised, the Committee may discuss the prospective nominee by a telephone conference call or at a meeting before the vote is taken. The chairman secretly reports the Committee's final rating to the Office of the Attorney General. The actual vote count is so carefully guarded by the Committee that the Office of the Attorney General is not informed of the final tally unless it was unanimous. Otherwise, a divided evaluation of the candidate will be described in general terms, for example, as "Qualified with a minority report of Not Qualified."

The liberal bias of the Committee is especially manifested in the critical early stages of the evaluation process. For example, once the Justice Department gives the ABA Committee the candidate's name, the Committee claims that a representative sample of the profession is interviewed.[12] But the Committee unabashedly admits that it has consulted with such liberal groups as Common Cause, the ACLU, NAACP, Women's Legal Defense Fund, the National Organization for Women, and Center for Law and Social Policy.[13] Conservative organizations are conspicuously ignored by the ABA Committee. This preference for the liberal input is consistent with the ABA Committee's written policy that it consults with "legal services and public in-

terest attorneys and attorneys who are members of various minority groups. Spokespersons of professional organizations including those representing women and minorities are also contacted."[14] Naturally, when these liberal groups are given the names of proposed Reagan nominees by the ABA Committee, they are apt to provide the ABA Committee with negative feedback, especially if the nominee expressed opposition to liberal court decisions in the civil rights area.

In late 1985, the Washington Legal Foundation ("WLF"), a conservative public interest group, requested that the ABA Committee give the names of the judicial candidates to WLF on the same basis as the liberal groups in order to provide some balance in the evaluation process. ABA Committee Chairman Robert Fiske, Jr. (a senior partner in the New York blue-chip firm of Davis, Polk and Wardwell and former Carter-appointed U.S. Attorney) flatly denied WLF's request.[15] Fiske, given the opportunity to have conservative input in the process, proclaimed that henceforth no private *groups* whatsoever would receive the candidates' names. Yet Fiske implicitly left the door open to the notion that *individuals* who represent these groups may still be contacted for their input on the nominees. The return to "business as usual" was confirmed in early 1987 when Mr. Fiske admitted that the ABA Committee relies on the views of women and minority groups in evaluating the judicial temperament of a candidate.[16]

In addition to relying on the views of liberal interest groups, the ABA Committee, apparently as part of its mission to evaluate "temperament," has indirectly admitted that it investigates the personal and ideological views of Reagan's judicial candidates. During the Carter Administration, the 1979 edition of the ABA's publication *THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY: What It Is and How It Works*, unambiguously stated: "The Committee does not attempt to investigate or report on political or ideological matters with respect to the prospective nominee." However, in the 1983 revision of the brochure, that sentence was significantly modified. It now reads: "The Committee does not investigate the prospective nominee's political or ideological philosophy *except to the extent that extreme views on such matters might bear upon judicial temperament or integrity*." This "exception" clause clearly

swallows up the rule. How else will the Committee determine what views are "extreme" unless it undertakes—by itself or in cooperation with others—to investigate the political and ideological philosophy of the candidate? This "extreme views" clause has been used to disqualify or downgrade candidates because of their conservative and even religious beliefs. Thus, the subjective criterion of judical "temperament" is the pretext permitting the Committee's inquisition into the personal beliefs of the candidates, and allowing the biases of the ABA Committee to filter through the approval process.

It is clear that the ABA investigation of a candidate's personal beliefs has been used adversely against Reagan nominees. Because of the secret and confidential nature of the ABA's evaluation process, it is admittedly difficult to conduct a thorough review of the ABA's conduct to determine how widespread this practice is. However, the following case illustrations should give the reader a good idea of what may very well represent only the tip of the iceberg.

Case No. 1: James L. Graham. In 1986, James L. Graham was under consideration for a judgeship for the United States District Court for the Southern District of Ohio. His credentials were impeccable. A *summa cum laude* graduate of Ohio State University College of Law in 1962, he spent the next 24 years specializing in civil litigation with a substantial federal practice representing individuals and corporations. The founding partner of his highly reputable law firm, Graham devoted substantial time to serving as a lecturer and teacher in continuing legal education programs. He published articles, served as an instructor in trial advocacy, participated in numerous bar association seminars and workshops, and was a faculty member of the Ohio Judicial College, lecturing to Ohio trial, appellate, and supreme court judges.

He was also honored by being selected for a fellowship to the American College of Trial Lawyers, an exclusive association of trial specialists limited to only one percent of the practicing lawyers, based on a minimum of 15 years of trial practice and peer recognition as an outstanding advocate. He was also a 24-year member of the ABA and was a member of three ABA sections. The Supreme Court of Ohio appointed him a bar examiner for five years, the last of which he served as chairman. In addition

to all of these legal and professional achievements, Graham is active in community service, is a solid family man, and enjoys a high reputation in the community. A screening panel of Ohio lawyers and others selected him as a top candidate for the judicial post.

With such an illustrious background, here was a Reagan candidate that many would regard as among the highest qualified. At least his experience and background merited an ABA "well qualified" rating. Yet the ABA Committee gave him their lowest rating of "Qualified" with a minority astoundingly finding him *not qualified*. This mixed rating was the subject of some inquiry by the Senate Judiciary Committee, but luckily, Graham was eventually confirmed.

How could the ABA Committee possibly have given Graham its lowest rating with even one or more members finding that he was unqualified? The answer may lie in the ABA's probe into Mr. Graham's religious beliefs and the totally subjective nature of determining "temperament." According to a published account of a letter from Graham to Chairman Fiske, the investigating Committee member, John C. Elam, probed Graham about his religious views because Elam had been told by anonymous sources that Graham was a conservative-orthodox (or "born again") Christian.[17] That Elam would even consider raising Graham's conventional religious preferences is disturbing. Even Fiske admitted that religion should not be a topic of inquiry in determining a candidate's qualification.[18] With so few people possessing the power to determine the fate of candidates, greater responsibility and accountability of the ABA must be demanded. This ABA inquisition into Mr. Graham's religious views was totally improper and should have been repudiated by anyone who regards himself as fair-minded. Yet the Graham incident was ignored (for the most part) by the media and totally ignored by the Senate. One can imagine the national uproar if a (hypothetically) conservative ABA had inquired of Carter's judicial nominees about their religious beliefs (or lack thereof).

The Chairman of the ABA Committee, when recently confronted with this blatant example of bias and improper line of inquiry, did not apologize or characterize the inquiry as an aberration.[19] Contrary to his earlier disavowal of the inquiry, he defended the probe of Graham's religious beliefs and expressed dis-

may as to why the judge had given a copy of his letter criticizing the Committee to the press in the first place.[20] (In fact, Judge Graham never gave his letter to the press; a copy was obtained from sources on Capitol Hill as indicated in the *Legal Times*.[21])

Graham's case not only illustrates the ABA's bias, but also demonstrates the inherent inability to make any meaningful comparison between the ABA ratings given to candidates from the Reagan and prior administrations. While other chapters in this book demonstrate that the ABA Committee ratings of Reagan nominees are, overall, as good or better as the ratings given to the Carter appointees, the Graham incident suggests that the ratings for the Reagan nominees are unfairly lower than they should be. Consequently, a more objective analysis would likely conclude that the Reagan nominees, as a whole, are better qualified than the Carter appointed judges.

Case No. 2: Professor William F. Harvey. In 1985, Professor William F. Harvey of Indiana University Law School was under consideration for a judgeship on the United States Court of Appeals for the Seventh Circuit. A former dean of the law school, author of a treatise on federal practice, a man well regarded by attorneys and judges alike in Indiana, Professor Harvey was clearly a suitable, perhaps ideal, candidate for the position. Yet the ABA investigation of Professor Harvey's qualifications seemed tainted from the start because of the ABA's conflict of interest on account of Professor Harvey's past affiliation as President Reagan's controversial Chairman of the Board of the Legal Services Corporation ("LSC").

Professor Harvey, as head of LSC in the beginning years of the Reagan Administration, cut wasteful LSC grants to various grantees. The ABA has long been a staunch supporter of LSC and is critical of anyone who dares suggest that the agency be abolished or reformed. Only recently at the 1987 ABA midwinter convention, ABA President Eugene Thomas publicly called for the resignation of LSC President Clark Durant for suggesting that the LSC may need to be replaced. Thomas was also indignant that Durant proposed that non-lawyers be allowed to provide routine counseling to the indigent.[22] If Reagan were to nominate Durant for a judgeship, could the ABA be anything but biased against him? The Harvey situation is similar in that respect, but the conflict of interest is much worse.

Before President Reagan could gain control of the LSC board in 1981, approximately $485,000 of taxpayers' money was given directly to the well-funded ABA by LSC. During part of that pre-Harvey period, the then-Chairman of LSC was simultaneously serving as Secretary of the ABA. The conflict is much worse than mere ABA self-dealing. The fact is that the taxpayers' funds were deposited in an ABA account called the "Fund for Public Education." A chief spokesman and fundraiser for this Fund was none other than Steven E. Keane. Keane, also a member of the ABA's Committee on Federal Judiciary, became the chief investigator of Professor Harvey's qualifications. The conflict of interest is obvious: neither the ABA nor Keane is particularly fond of Professor Harvey, who cut off the federal funding spigot to the ABA and other ABA-favored grantees. Again, the major media continues to ignore this obvious scandal.

Despite this glaring conflict, neither Mr. Keane nor the ABA Committee recused themselves from the investigation of Harvey. The ABA inordinately delayed its investigation of Professor Harvey so that he felt it necessary as the new academic year approached to honor his commitment to teaching that year. Harvey still expressed his interest and availability to be a judge, but no further action has been taken on the Harvey nomination even though a seat remains open on the Seventh Circuit. Although the Department of Justice and the White House expressed serious concerns in mid-1986 about the ABA's conflict of interest,[23] no alternative action by the Administration, such as establishing an independent panel to review Professor Harvey's qualifications, was taken.

Questioned about this matter, Fiske publicly stated that he saw no conflict of interest in the Harvey investigation and stated that Harvey's charge that Keane was affiliated with an ABA committee affected by LSC decisions was false.[24] Yet the ABA's own publication in 1985 describes in detail Keane's active role with the ABA's Fund for Public Education, the past recipient of LSC largesse.[25]

Case No. 3: Miriam Cedarbaum. Even the ABA Committee members, while generally blind to conflict of interest considerations, recognized they had a problem when the Administration nominated Miriam Cedarbaum for a district judgeship in New York. Cedarbaum, a Democrat, was suggested for nomination

in 1985 by Senator Daniel Moyniham (D-NY) through an arrangement with Senator Alfonse D'Amato (R-NY). Cedarbaum was a senior associate at Davis, Polk and Wardwell, Fiske's law firm. After public questioning about the conflict of interest, Fiske admitted that while he disassociated himself from Cedarbaum's consideration, the rest of his Committee did not.[26] Fiske apparently believes that there is not even an appearance of favoritism in having his Committee members investigate his colleague.

Case No. 4: Professor Lino Graglia. In 1985, Professor Lino Graglia of the University of Texas at Austin was under consideration for a circuit judgeship on the Fifth Circuit. Professor Graglia is a nationally noted constitutional law professor who has written widely on the jurisprudence of original intent.[27] He is easily qualified to be a circuit judge and his jurisprudential views are certainly consistent with the President's.

The ABA, however, strongly disapproved of the professor's learned criticism of certain court decisions, especially those mandating forced busing. It seems that anyone who dares challenge the ABA's sacred cows in the civil rights area must have something wrong with his temperament. Professor Graglia stuck to his principles and did not recant for the benefit of the ABA, thus earning him a negative rating. The Administration sought ABA reconsideration of the ruling, and even briefly considered circumventing the Committee, but to no avail.

Members of the ABA Committee make it no secret that they are ideologically opposed to the Reagan Administration's civil rights position, and, presumably, any judicial candidate who shares that view. For example, Committee members Joan Hall and Jerome J. Shestack, who are also on the Board of Trustees of the liberal Lawyers' Committee for Civil Rights Under Law, submitted joint testamony with other trustees of the civil rights group before the Senate Judiciary Committee in June 1985, viciously attacking the nomination of William Bradford Reynolds to become Associate Attorney General because of his civil rights policies. Hall and Shestack characterized Reynold's record as one that "reflects an abdication of responsibility for the enforcement of civil rights and, even more disturbing, a disregard for the rule of law as it governs those rights." Reynolds, of course, was vigorous in carrying out the Reagan Administration's

"color blind" policy in enforcing the civil rights laws. Consequently, the objections by Hall and Shestack are more properly seen as an objection to the Administration for not accepting the agenda of the liberal civil rights establishment. Could *any* Reagan nominee who agrees with Brad Reynolds' position hope for a fair evaluation from the ABA Committee? Obviously not.

FEDERAL ADVISORY COMMITTEE ACT

In addition to these doubts about the ABA's liberal bias and conflicts of interest, there is a serious question whether the Committee's Star Chamber-like proceedings are in violation of the Federal Advisory Committee Act of 1972 ("FACA") which requires private advisory panels to be officially chartered and to hold proceedings open to the public. That issue may soon be resolved by courts due to lawsuits brought in 1985 and 1986 by the Washington Legal Foundation against the ABA and the Department of Justice.[28]

That the ABA Committee is an advisory committee subject to FACA is obvious. The Committee has freely admitted to its "advisory relationship" with the President, but continues to operate in violation of FACA. Section 3 of FACA defines the term "advisory committee" as "[a]ny committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof which is . . . established or utilized by the President, or established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . ." The express language of FACA covers the Committee because it is utilized by the President and the Justice Department for the purpose of obtaining advice on the qualifications of a prospective nominee for the federal judiciary.

Moreover, courts have interpreted FACA broadly, eliminating all doubt whether groups such as the ABA would be covered. In *Food Chemical News, Inc. v. Davis* (1974)[29] for example, it was held that two separate "informal" agency meetings with consumer groups and distilled spirits industry representatives were meetings of "advisory committees" within the meaning of FACA, when the purpose was to give advice to the Bureau

of Alcohol, Tobacco and Firearms on the drafting of proposed regulations. Judge Henry Friendly for the United States Court of Appeals for the Second Circuit held in *National Nutritional Foods Association v. Califano* (1979)[30] that a group of five physicians who were in town for a conference and met with Food and Drug Administration officials only *once* during an afternoon, for the purpose of advising them on proposed regulations, was a federal advisory committee. Judge Friendly reasoned that the group, like the group of industry representatives in *Food Chemical News*, was relied upon so heavily by government officials that FACA applied. "If the straitjacket [of FACA] is too tight," he observed, "Congress is free to loosen it."[31] Thus, if FACA is applicable to loosely organized, ad hoc groups, it certainly applies to formal committees such as the ABA Committee.

The President and the Justice Department rely significantly, in some cases almost exclusively, on the ABA Committee for advice on qualifications of federal judicial nominees. Though not sanctioned by law, this reliance has been publicly acknowledged, regular, and longstanding. The inescapable conclusion is that the Committee is subject to FACA.[32]

The ABA and the Justice Department respond to these charges by weakly claiming that despite the broad language of FACA, Congress did not intend to cover the ABA because the ABA was not specifically mentioned in the legislative history of FACA. In the alternative, they make the novel argument that FACA violates the separation of powers if it were to apply to the ABA because the advice the ABA gives relates to the President's appointment powers under Article II. WLF counters by arguing that the express language of a statute overrides congressional silence on a subject, which is the preferred method of determining legislative intent. As for the constitutional argument, WLF argued that FACA simply does not usurp any substantive power of the President. Furthermore, if FACA is unconstitutional just because it tangentially relates to a Presidential power, then the Freedom of Information Act, the Sunshine in the Government Act, and similar laws would all be unconstitutional as it applies to the entire Executive Branch because those laws relate to the President's exclusive power under Article II that he take care that the laws be faithfully executed.

If the court rules in WLF's favor, the Committee must open its meetings and records to the public. The Freedom of Information Act and the Sunshine Act are both incorporated in FACA. Thus, the Committee must publish notices of its meetings in the Federal Register and holds its meetings with a designated federal official present and with the approval of such federal official.

The ABA Committee is also subject to Section 5 of FACA, which requires that advisory committees be "fairly balanced in terms of points of view represented and the functions to be performed . . ." The Committee clearly violates this provision. For one thing, only practicing lawyers are members of the Committee. Moreover, these practicing lawyers are mostly from corporate law firms in large metropolitan areas. The Committee membership is also unbalanced philosophically, because it openly exhibits a liberal bias. Not surprisingly, some of the Committee members were part of the Carter Administration or are openly supportive of the liberal agenda.

FINAL THOUGHTS

The foregoing suggests that there are indeed serious flaws with the ABA screening process, which allows the liberal biases of the ABA and the members of its Standing Committee to work against conservative nominees. Unfortunately, the Department of Justice and the White House have permitted this special interest group to continue to produce such skewed advice. No other private group wields such power over the judicial selection process, and there is nothing analogous in the rest of government. The American Medical Association, for example, does not screen or pass judgment on the qualifications of proposed nominees for the Surgeon General. Why should the ABA be given such a preferred status?

The only real hope of reform is a successful outcome of our current litigation against the ABA. The application of FACA to the ABA, requiring an open and balanced forum, would go a long way toward correcting the abuses of the screening process.

REFERENCES

The Questionable Role of the American Bar Association in the Judicial Selection Process by Daniel J. Popeo and Paul D. Kamenar.

1. *Clark v. United States*, 72 F. Supp. 594 (Cl. Ct. 1947), *cert. denied*, 333 U.S. 833 (1948).
2. *See* 28 U.S.C. §§44(a), 133.
3. For an excellent historical review of the ABA's influence in the judicial selection process, *see* Joel B. Grossman, *Lawyers and Judges* (New York: John Wiley and Sons, 1965).
4. American Bar Association, "American Bar Association Standing Committee on Federal Judiciary: What It Is And How It Works" (1983), p. 3 (hereinafter "*ABA Committee Brochure*").
5. If the rating is unanimous, the final rating so states. Otherwise, a mixed rating may be given, e.g., "qualified/not qualified," but the exact tally of the majority and minority votes is not revealed.
6. The *ABA Committee Brochure*, pp. 4-5 defines the ratings as follows:

   "To be rated *Exceptionally Well Qualified*, the prospective nominee must stand at the top of the legal profession in the community involved and have outstanding legal ability, wide experience and the highest reputation for integrity and temperament. In addition to preeminence in the law, the prospective nominee should have a reputation as an outstanding citizen, having made important community and professional contributions in order to merit the sparingly awarded 'Exceptionally Well Qualified' evaluation.

   To be *Well Qualified*, the prospective nominee must have the Committee's strong affirmative endorsement and be regarded as one of the best available for the vacancy from the standpoint of competence, integrity and temperament. The evaluation of *Qualified* indicates that it appears the prospective nominee would be able to perform satisfactorily as a federal judge with respect to competence, integrity and temperament.

   When a prospective nominee is found *Not Qualified*, it means that the Committee's investigation indicates that the prospective nominee is not adequate from the standpoint of competence, integrity or temperament."
7. Confirmation Hearings On Federal Appointments: Hearings Before the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 330 (1984) (statement of Mr. Buesser) (emphasis added).
8. Speech by Robert B. Fiske, Jr. before a meeting of the Washington, D.C. Chapter of the Federalist Society, on March 20, 1987.
9. *Id.*
10. Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 274 (1984) (testimony of Edward C. Schmults).
11. Only in very rare occasions will the Administration continue to press for a formal report if the preliminary rating indicates a "not qualified rating." This happened once in the Reagan Administration when Sherman Unger was nominated despite a "not qualified" ABA rating. During his confirmation hearings, Unger was highly critical of the ABA evaluation process and the lack of fundamental fairness in the manner in which he was accused of improper activities by anonymous sources. He even suggested that the ABA's advisory role was violative of the Federal Advisory Committee Act. The ABA nevertheless boasts that only in rare instances—less than one percent—has a President gone ahead and nominated an individual who received a "not qualified" rating. *ABA Committee Brochure*, p. 6.
12. *ABA Committee Brochure*, p. 5.

13. Selection and Confirmation of Federal Judges: Hearings before the Senate Comm. on Judiciary, 96th Cong., 1st Sess. (Jan. 25, 1979) (testimony of ABA Committee Chairman Brooksley Born).
14. *ABA Committee Brochure*, p. 6.
15. *See* Letter of Robert B. Fiske, Jr. to Paul D. Kamenar dated November 26, 1985.
16. Fiske speech, *supra* n. 8.
17. *Legal Times*, Dec. 15, 1986, p. 7.
18. *Id.*
19. Fiske speech, *supra* n. 8.
20. *Id.*
21. *Legal Times*, *supra* n. 17.
22. *See* Washington *Post*, March 1987.
23. *See* Indianapolis *Star*, June 18, 1986, p. 18.
24. Fiske speech, *supra* n. 8.
25. ABA, "Ways and Means of Investing the ABA Fund for Public Education," Spring 1985, p. 1.
26. Fiske speech, *supra* n. 8.
27. Graglia is a profound legal scholar whose work product belies the small-minded criticisms of his enemies. He is the author of the definitive examination of Supreme Court precedent on forced busing, *Disaster by Decree: The Supreme Court Decisions on Race and the Schools* (Cornell University Press, 1976). Other Graglia works include "How the Constitution Disappeared," *Commentary*, February 1986; "Constitutional Mysticism: The Aspirational Defense of Judicial Review," 98 *Harvard Law Review* 1331 (1985); "Racially Discriminatory Admission to Public Institutions of Higher Education," in R. Collings, ed., *Constitutional Government in America* (Carolina Academic Press, 1979); and "How the Constitution Came to Require Busing for School Racial Balance," forthcoming in 85 *Michigan Law Review* (1987).
28. *Washington Legal Foundation* v. *ABA*, Civil Action No. 85-3918 (D.D.C.); *Washington Legal Foundation* v. *Department of Justice*, Civil Action No. 86-2883 (D.D.C.)
29. *Food Chemical News, Inc.* v. *Davis*, 378 F. Supp. 1048 (D.D.C. 1974).
30. *National Nutritional Foods Association* v. *Califano*, 603 F. 2d 327 (2d Cir. 1979).
31. *Id.*, at p. 336.
32. 5 U.S.C. App. I, §§10(a), (e), (f).

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WRITTEN TESTIMONY FOR THE RECORD OF THE PUBLIC CITIZEN LITIGATION GROUP CONCERNING THE NOMINATION OF ROBERT H. BORK TO THE SUPREME COURT OF THE UNITED STATES
(October 5, 1987)

We appreciate the opportunity to present written testimony on the nomination to the United States Supreme Court of Judge Robert H. Bork. Public Citizen Litigation Group (PCLG) is a 10-member, public interest law firm founded by Ralph Nader in 1972. Since that time, Litigation Group attorneys have represented clients in approximately 150 cases in the United States Court of Appeals for the District of Columbia Circuit, the Court on which Judge Bork now sits, and in 18 cases before the United States Supreme Court, the court to which he has been nominated. Since his appointment to the D.C. Circuit, we have also participated in 15 cases heard by Judge Bork, including 13 oral arguments.

Although the composition of the federal judiciary can vitally affect our work, Public Citizen Litigation Group has never previously taken a position on a judicial appointment. Nevertheless, we departed from our prior practice and decided to undertake a comprehensive study of Judge Bork's judicial record. There were several reasons for this decision. First, based on our experience in the D.C. Circuit, we were more troubled with the appointment of Judge Bork than with any Supreme Court appointment since the Litigation Group was founded. Second, in

recent years Justice Powell had been a swing vote on many crucial issues, and therefore it appeared to us that Judge Bork's impact on the Court would be greater than that of any recent appointee. And finally, even before President Reagan made the announcement, it was clear that the nomination of Judge Bork would be extremely controversial, and we felt that, due to our experience in the D.C. Circuit and the Supreme Court, we were uniquely qualified to evaluate Judge Bork's judicial record.

Our report, "The Judicial Record of Judge Robert H. Bork," was released on August 6. The typewritten version was distributed to all Senators and subsequently we published the report in the form of a 96-page book. The report has already been admitted into the record of these hearings. Tr. September 22, 1987, p. 199. Since we corrected several minor typographical errors in the typewritten version, we are submitting a copy of the printed edition with this testimony, and we request that the report be included in the record in that form.

The report concentrated on the 144 opinions that Judge Bork published prior to July 1, 1987, when President Reagan nominated him to a seat on the Supreme Court. In addition, we tabulated Judge Bork's votes in split cases, those cases in which at least one judge disagreed with the majority on how the case should be resolved and filed a dissenting statement. The major findings of the report were as follows:

* Judge Bork's performance on the D.C. Circuit is not explained by the consistent application of judicial restraint or any other identifiable judicial philosophy; instead, in

split cases (those cases in which one or more judges filed a dissenting statement), one can predict his vote with almost complete accuracy simply by identifying the parties to the case;

* 96% of the time (in 48 out of the 50 split decisions involving the government or access to the courts), Judge Bork voted against access (14/14 cases), against environmental groups, workers, consumers or other individuals (26/28 cases) or for businesses (8/8 cases);

* Judge Bork has expressed a desire to narrow the constitutional protections of individuals and to interpret the antitrust laws in a manner that would be detrimental to consumers and small businesses;

* Judge Bork is far less a friend of the First Amendment than some have suggested, as evidenced by four cases in which he voted against the First Amendment claims of political demonstrators;

* Judge Bork interprets the doctrine of separation of powers in a manner which favors the executive branch of the government and which would diminish the role played by Congress and the judiciary in interpreting the Constitution and enforcing settled principles of law;

* On several occasions, Judge Bork's colleagues have been extremely critical of him for misinterpreting Supreme Court precedent and going beyond the facts of a particular case.

Since the Report is already in the hearing record, we will not restate its findings here. However, we would like to make a few additional points.

The statistics have received widespread attention because they provide strong evidence that Judge Bork is a result-oriented jurist who votes on the basis of the parties to the lawsuit. We intentionally declined to adopt this conclusion in our report,

and we recognize that there is another possible explanation for Judge Bork's voting patterns in close cases -- namely that it is his philosophical approach to applying law, rather than the identity of the parties, that led to these strikingly consistent results. But having acknowledged this possibility, we would also argue that Judge Bork's adoption of a judicial philosophy that, in close cases, consistently leads to denying access to the courts, to voting against public interest groups, workers and individuals, and to voting in favor of business interests, is also a sound basis for refusing to confirm his nomination.

The tabulations of split cases have been both praised and criticized. For example, in a recent article in the New York Review (October 8, 1987), pp. 60-61, Professor Ronald Dworkin, an eminent legal theorist and professor of law at New York University, restated the Litigation Group report's conclusions and then, cautioning that "[s]tatistics of this sort must be used with great care," observed that the statistics on nonunanimous cases decided by Judge Bork are "striking" because "they are so stark" and also "because the judicial philosophy he cites to explain his anti-individual, pro-business votes is so transparently insubstantial." Professor Dworkin then concluded that "a case by case study confirms what the figures suggest.'

On the other hand, Senator Simpson has severely criticized the Report. In his opening statement he stated as follows:

> Since this man's name was proposed by the President, the various interest groups have been salivating at the chops, and I note they have been thoroughly engrossed in an exercise that must be the epitome for a lawyer --

> pouring over nonunanimous decisions. What an exercise. . . . I referred to them once as "bug-eyed zealots." I have no reason to change that opinion at all.

Tr. September 15, 1987, p. 54. In addition, on the eve of Judge Bork's confirmation hearings, the Justice Department released a 200-page analysis of the reports that had been issued on Judge Bork's judicial record, focusing on our book. Finally, the report was singled out for criticism in a paper by Richard B. Stewart, a witness who testified at the hearings. See Tr. September 22, 1987, pp. 141-145. Our principal responses to the criticisms of our report were anticipated and answered in the report itself. However, we would like to address the recurring criticism of our methodology, as well as several of other specific points that have been made.[1]

The Selection of Nonunanimous Cases

Senator Simpson and others have criticized the report for focusing on nonunanimous cases. However, this criticism ignores the fact that the report is based on a study of all of Judge Bork's opinions, including the significant opinions from which there were no dissenting votes. We did present in the report several tables of Judge Bork's votes in split decisions, and we limited the tabulations to nonunanimous cases for several reas-

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[1] The Judiciary Committee initially advised us that we could appear as witnesses at the hearings, which we were particularly anxious to do in order to respond to the criticisms of Senator Simpson, Professor Stewart, and others. However, on September 28, two days before the hearings concluded, the Committee informed us that we would not be permitted to testify.

ons. First, many of the cases heard by any U.S. Court of Appeals involve relatively simple, straightforward, noncontroversial issues. In fact, the caseload of courts is so noncontroversial that during 1985 and 1986, 96% of all federal circuit court of appeals' decisions were unanimous. "All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals," 87 Columbia Law Review 101, 122-23 n.77 (1987). Because the noncontroversial cases so overwhelm those that are controversial, it was necessary to somehow isolate the controversial or important cases in evaluating Judge Bork's record. One way to do this would be to make a judgment, identifying "important" cases and then to tabulate Judge Bork's votes in those cases. This would have exposed the report to the criticism that we had exercised our subjective judgment in evaluating Judge Bork's judicial record.

Instead, we chose to limit the statistics that were presented in the study to split decisions, which was a rough but, in our view, objective way of selecting important cases. By definition, split decisions are cases in which the judges on the panel disagree on an issue that is sufficiently important for one member to write a dissenting opinion. These cases tend to be the cases that are accepted by the Supreme Court for review. They are also the close cases since at least one judge took each side of an issue on which the court was split. Because in every split case at least one of Judge Bork's colleagues disagreed with his position, we believe that a tabulation of Judge Bork's votes in

those cases and of the party for which he voted provides information that is useful in evaluating Judge Bork's nomination.[2]

The Stewart and Justice Department Papers

The two principal studies criticizing our report are the paper submitted to the Committee by Richard B. Stewart, a professor at Harvard Law School, and the Justice Department Report. The Stewart paper (p.3 n.1) charges that "in many instances the account of the case and of Judge Bork's position is incomplete, distorted, or otherwise seriously misleading"; yet the paper fails to identify any inaccuracies. Instead, Professor Stewart reviewed 12 cases, and his general approach was to discuss each case and then to conclude that Judge Bork's resolution of the case was reasonable. As any attorney knows, and as is evidenced by the dissenting opinions in the split cases, these are issues on which reasonable people can disagree. We have presented our analysis in our report and will let others decide which study has more validity.

Many of the Justice Department criticisms are based on disagreements that can best be resolved by reading the cases, but the Justice Department Report also contains numerous misstate-

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[2] There is a certain irony in the criticism, advanced by some, about the fact that we used statistics at all. After all, the White House produced a briefing book containing numerous statistics about Judge Bork's judicial performance, which purported to demonstrate Judge Bork's qualifications to serve on the Supreme Court. Moreover, Judge Bork is himself a leading proponent of the "law and economics movement," which analyzes legal issues in terms of complex statistical formulas and curves drawn from microeconomic analysis.

ments and inaccuracies. We do not believe that it would be productive to discuss each of the differences between the two reports, particularly since in many cases the Justice Department's misstatements are apparent from reading our report and Judge Bork's opinions. However, we would like to make a few general points with respect to the Justice Department Report and to provide a few examples of the Department's misstatements.

1. In many places, the Justice Department did not provide any data to evaluate its claims. For example, the Justice Department claims that, using PCLG's methodology, it can be demonstrated that Justice Powell voted for business 78% of the time during a five year period and against civil rights claimants 79% of the time during a fifteen year period. Nowhere does the Justice Department provide the names of the cases that it identified as nonunanimous. In contrast, PCLG provided an appendix identifying the nonunanimous cases that it utilized, and at the beginning of each section of its report identified the nonunanimous cases that it included in the table pertaining to that section.

2. The Justice Department used highly selective methodology. Again, with respect to Justice Powell, the Justice Department provided figures only for civil rights and business cases, but not for the many other categories of cases (access, labor, etc.) which Public Citizen evaluated. The striking finding about Judge Bork's judicial record was not that his votes were pro-business and anti-individual in a single area, but that his votes fell into that pattern in every category of cases in which he

participated while on the D.C. Circuit. No comparable data is provided for Justice Powell, and we believe that it would be reasonable to conclude from this omission that Justice Powell would have differed from Judge Bork in the other categories of cases. Nor is there any explanation for the comparison of Justice Powell's pro-business votes during a five-year period with his anti-civil rights votes during a 15-year period. See Justice Department Report, Executive Summary, p. 3 and Report, p. 36. The inference that we draw is that the different time periods were selected in order to present the most dramatic statistics, despite their lack of comparability. In contrast, our study covered a single period of time -- Judge Bork's entire career on the bench up to the date of his nomination.[3]

3. The Justice Department report uses a number of misleading and incorrect statistics. For example, the report claims ("Summary of Significant Statistics") that "Judge Bork voted for the civil rights claimant in 7 of 8 substantive civil rights cases." Unfortunately, Judge Bork repeatedly cited this figure in his testimony. E.g., Tr. September 16, 1987, p. 184, Tr. Sep-

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[3] The Justice Department (pp. 20-21, 151-52) criticized us for counting National Resources Defense Council v. Environmental Protection Agency, 804 F.2d 710 (1986), as a split decision because after Judge Bork was nominated, but before we released our report, Judge Bork changed his vote in the case. Our classification of this case followed from our initial decision to review only the cases Judge Bork decided prior to his nomination. Had we included all Judge Bork's decisions up to the date of his nomination, we would have included other decisions in which he voted against public interest groups, workers, consumers and/or individuals. In any event, our report (p. 16 n.11) disclosed the fact that Judge Bork had changed his vote in the National Resources Defense Council case.

tember 18, 1987, p. 15. In fact, in reviewing Judge Bork's opinions, we have identified 18 additional civil rights cases omitted by the Justice Department, in 14 of which Judge Bork ruled entirely against the civil rights plaintiffs; in only one did he rule wholly in favor of the plaintiff. He ruled against civil rights in every one of these cases in which he wrote an opinion, and in every case in which at least one judge disagreed about the outcome, Judge Bork was less in favor of the plaintiff than at least one other judge who considered the case. A copy of that analysis is attached as Exhibit A.

We have also prepared a two-page response to statistics that have frequently been cited by the White House in support of Judge Bork's nomination. Many of those were cited by the Justice Department, and therefore a copy of that paper is attached as Exhibit B.

4. The PCLG tables placed cases in particular categories (access, First Amendment), and the Justice Department frequently disputes the category chosen by PCLG. We identified the choice being made in our report and indicated where another choice was plausible. The Justice Department argues that in some cases the choices disfavored Judge Bork, but it neglects to note that in several instances PCLG made choices that plainly favored Judge Bork. For example, PCLG counted Reagan v. FEC, 734 F.2d 1569 (1984), as one of the two cases in which Judge Bork voted for individuals in a case against the government, even though one of the individuals in that case was President Reagan. Similarly,

because the plaintiff requested that the case be transferred from federal court, we omitted Weisberg v. Department of Justice, 763 F.2d 1436 (1985), from the access table, even though in that case Judge Bork voted to transfer the case to the Federal Circuit and thus to deny access in the D.C. Circuit.

5. The Justice Department, perhaps intentionally, misstates other aspects of PCLG's methodology, and consequently draws conclusions that are extremely critical of the report. For example, it argues that Norfolk & Western Railway v. United States, 768 F.2d 373 (1985), illustrates the flaws in the techniques used by PCLG in its tables. Because Norfolk & Western prevailed on the issue on which the court was split, PCLG counted that case as one where Judge Bork had voted in favor of business and against the government, which he plainly did. In its criticism, the Justice Department makes two arguments. First, it points out (pp. 17-18) that "the case did not merely involve a dispute between a government agency representing consumers . . . and business," but instead involved rates that one business (the railroads) charged another business. Judge Bork also made this point in his testimony. Tr. September 17, 1987, p. 163. However, PCLG never argued that Judge Bork's vote in Norfolk and Western was "anti-consumer." Instead, our point was that in that case (and in every other split decision in which a business sued the government), Judge Bork voted in favor of the business and against the government on the issue on which the court split, thereby raising questions about his adherence to his alleged philosophy of

judicial restraint when a business sues the government.

The Justice Department also argues that PCLG could have categorized Norfolk and Western as an access case in which Judge Bork's vote would have been counted as favoring access to the courts. Again this argument ignores the methodology used by PCLG in its report. While it is true that a jurisdictional issue was raised in the Norfolk and Western case, the court was unanimous on that question, and therefore, pursuant to the methodology discussed in the introduction to our report, the case was not categorized as a standing case. However, since the court was split on the issue of the appropriate rates to be charged by the business, the case was classified as an administrative law case in which a business sued the government. This same (possibly intentional) refusal to understand the methodology of the PCLG study pervades the Justice Department Report. See, e.g., pp. 157-58 (discussion of National Soft Drink Association v. Block, 721 F.2d 1348 (1983)).

The Justice Department's criticism of our classification of Reuber v. United States, 750 F.2d 1039 (1984), shows the same flaw. As mentioned twice in the report (pp. 7 n.8, 40 n.24), we did not count the case because there was no disagreement among the judges concerning the plaintiff's claim against the government. The Justice Department argues (p. 13) that the very name of the case shows that the government was a party, which is true enough, but the judges were unanimous that the claims against the government had to be dismissed. The split was about

the disposition of the claims against private businesses that were also defendants in the case.

6. The Justice Department attacks (pp. 162-63, 165) the classification of National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165 (1986), as a vote favoring a business interest because the petitioner in that case was a union, and Judge Bork had voted to overturn an agency decision holding that the union committed an unfair labor practice. Judge Bork made the same criticism in his testimony. Tr. September 17, 1987, p. 162. However, even Judge Bork would have to agree that the mere fact that a union is the plaintiff does not mean that the interest at stake is not that of a business. For example, unions often have to litigate claims that they have violated the law applicable to a person employed on the union staff, and when the union is acting as an employer, surely it is correct to think of it as a "business." NTEU was a harder case to classify, because the dispute was not between the union as an employer and one of its own employees, but between the union and one of the employees it represents, about whether the union had done enough to protect the employee's interests against the government agency for whom the employee worked. We decided to treat the interest at stake as that of the union as a business for two reasons: unions are in the business of providing such representation (for which the employees pay dues), and Public Citizen's long experience in representing individuals who have been unfairly treated within unions has taught us that in those circumstances unions

act like other businesses. Nevertheless, recognizing that this was not an easy call, we twice disclosed the issue in our report (pp. 11, 15), so that readers could make their own judgments.

7. One of the most amusing inaccuracies is the Justice Department's discussion of Greenberg v. FDA, 803 F.2d 1213 (1986), and in particular the comment (p. 176) that "[t]his was not a case, in fact, between the government and a citizen, but between two rival businesses." While it is true that Technicare Corporation had intervened on the side of FDA in order to argue that the records sought were properly withheld, Allen Greenberg, the plaintiff, was an employee of the Public Citizen Health Research Group, who sued the Food and Drug Administration for access to certain records under the Freedom of Information Act, and was represented by the Public Citizen Litigation Group. Plainly, this case cannot be fairly described as a lawsuit between two "business interests."[4]

8. In Appendix A to its report, the Justice Department claims to rework the statistical studies using PCLG's methodology, and, not surprisingly considering the argumentative nature of the rest of its report, generates statistics far more favorable to Judge Bork. We do not believe that it would be fruitful

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[4] The Justice Department's criticism (pp. 12-13) of our classification of Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987), is similarly off the mark. As the Justice Department acknowledges (Report, pp. 12-13), Judge Edwards identified his opinion as a dissent, and it was therefore appropriate for us to classify the case as a split decision. In any event, a reading of the opinions makes it clear that Judge Bork disagreed with Judge Edwards on the issue of standing.

to respond to each of the disagreements between the Justice Department and PCLG as to the classification of cases, but we do think that it is relevant that two other diverse organizations -- the Columbia Law Review and the AFL-CIO -- performed independent reviews and reported essentially the same results as PCLG. Anyone seriously interested in the issue of how Judge Bork's opinions should be classified can read the split opinions for him or herself (they are identified in an appendix to the PCLG report) and reach an independent judgment.

However, we would like to state for the record that the Justice Department has made serious errors in its classification of cases, using the access cases as an example. PCLG identified 14 access cases where there were split decisions in which Judge Bork voted to deny access, and no cases where he voted to grant access.[5] The Justice Department "reworks" those numbers and identifies three split cases where Judge Bork voted to grant access. In each case, the Justice Department's classification can only be described as ridiculous.

The first case is Weisberg v. Department of Justice, 763 F.2d 1436 (1985), where, as discussed above, Judge Bork concluded

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[5] The only significant error in our report that we have identified in the course of preparing this response (but which was not identified by the Justice Department or by any other critic of which we are aware), is in this category of cases. We included Hohri v. United States, 793 F.2d 304 (1986), as a split access case. Although Judge Bork wrote an opinion denying access in that case, his vote was cast in an opinion dissenting from the decision to deny rehearing en banc, and therefore under our methodology should not have been included in the table on access cases even though his position clearly denied access to the courts.

that the D.C. Circuit did not have jurisdiction to decide the case, but that the case should be transferred to the Federal Circuit. There is a strong argument that the case should be classified as one where Judge Bork voted to deny access to the plaintiff, because Judge Bork ruled that his court had no jurisdiction. But it certainly cannot be seriously argued that in this case Judge Bork voted to grant access, as the Justice Department claims.

The Justice Department's analysis of Jersey Central Power and Light Co. v. FERC, 810 F.2d 1168 (1987), which we did not include as an access case, is even more seriously flawed. The Federal Energy Regulatory Commission ruled that Jersey Central could recover from the ratepayers for the cost of building a nuclear power plant, but that the company was not entitled to charge shareholders for the profit it had expected. Judge Bork held that Jersey Central was entitled to a "reasonable" return on the investment if it could demonstrate that its higher rates did not exceed those of neighboring utilities. Because the forum for deciding this issue was an administrative law hearing, the Justice Department classified this case as one in which Judge Bork voted to "grant" access to the petitioners. However, since the issue in the case in which there was a split was whether the utility had a substantive right, and since the hearing merely followed from granting that right, the case plainly does not involve an access issue.

Finally, in Bennett v. Bennett, 682 F.2d 1039 (1982), which

we also did not classify as an access case, Judge Bork joined a decision which held that a divorced father could sue in federal court to obtain monetary damages from his former wife who had kidnapped the couple's child, but that the father could not obtain an injunction requiring the wife to return the child. The dissent agreed that the federal courts had jurisdiction to award the father damages, but dissented on the issue of whether the Court had jurisdiction to grant injunctive relief. Therefore, on the only issue on which there was a split, Judge Bork joined an opinion denying access, and PCLG counted the opinion as such in its report. Nevertheless, the Justice Department regards the fact that Judge Bork agreed that the federal courts had jurisdiction over the damage issue, an issue on which there was no split, as a basis for classifying the case as a split decision where Judge Bork voted to grant access.

* * * * * *

At the hearings on Judge Bork's nomination, most of the testimony concerned the positions that Judge Bork took as an academic, which he had reaffirmed in speeches given since he joined the D.C. Circuit. We have reviewed this body of work and find it remarkable that Judge Bork has never given a speech or written an article exploring ways to use the law -- constitutional or statutory -- to benefit the people in our society who are poor, who are handicapped, who have suffered from discrimination, or who have simply been overpowered by the large institutions in our society. Instead, Judge Bork has devoted his career to criti-

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cizing legal doctrines designed to help the disadvantaged, his principal argument being that a judge's job is to remove all emotion from his or her analysis of legal arguments. See generally "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1 (1971).

We observed a similar pattern in Judge Bork's judicial record. In our opinion, the most troubling aspect of his judicial record is the absence of any significant opinion that Judge Bork has authored, or of any vote that he cast in a difficult case, which advanced the lot of minorities, workers, consumers, or other disadvantaged individuals in our society. This theme is particularly troubling when it is contrasted with Judge Bork's performance as a judicial activist in cases where a business sues the federal government. For these reasons, and on the basis of our detailed review of Judge Bork's entire judicial record, Public Citizen and Public Citizen Litigation Group oppose the nomination of Judge Bork to the Supreme Court.

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JUDGE BORK'S CIVIL RIGHTS RECORD ON THE COURT OF APPEALS

by Paul Alan Levy,
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In his testimony, Judge Bork tried to mitigate his anti-civil rights statements of the past by, in part, pointing to his record on the court of appeals. He testified that he had ruled in favor of the minority or female plaintiffs in seven out of the eight civil rights cases on which he had sat. In fact, he was able to come up with this statistic only by limiting his list to cases in which plaintiffs sought to enforce the constitution and civil rights statutes, and even then by omitting 18 such cases in which he also participated, in almost every one of which he voted against the civil rights plaintiffs. My research, performed following the disclosure of the list of cases upon which Judge Bork relied in his testimony,[1] indicates that of these additional 18 cases, Judge Bork ruled entirely against the plaintiffs 14 times, largely against them twice, largely in their favor once, and entirely in their favor once. Combining these figures with the cases cited by Judge Bork, he ruled entirely against the civil rights plaintiffs in 15 cases, largely against them in three cases, largely in their favor in two cases, and entirely in their favor six times.

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[1] The list of Judge Bork's pro-civil rights cases was issued by Senator Humphrey's office, labeled somewhat differently than he did in his testimony as his "significant pro-minority and pro-women decisions." My analysis of additional cases was done by reviewing computerized files created at the outset of Public Citizen Litigation Group's review of Judge Bork's judicial record. It is possible that Judge Bork participated in other civil rights cases, in addition to the ones identified in this analysis.

EXHIBIT A

Most startling, in the 9 cases where at least one judge expressed a different view from Judge Bork, Judge Bork was less in favor of the civil rights plaintiff in each case. Moreover, in 7 of the 8 cases in which Judge Bork wrote an opinion, he wrote to reject the plaintiffs' claims; in the eighth case, his opinion was less favorable to the plaintiffs than the majority opinion. Therefore, a review of Judge Bork's complete judicial record on civil rights does not support his claim that he was an enforcer of civil rights while on the bench.

Nor do the cases which he identified provide much support for his assertion that his court of appeals record provides a significant counterweight to his previous views, for several reasons. First, each of the cases in which he voted for the civil rights plaintiff was unanimous, and most were relatively straightforward, unanimous decisions applying the statutory language and binding precedent from the Supreme Court or the D.C. Circuit. Second, in none of the cases in which he voted for a civil rights plaintiff did he sign an opinion for the court; curiously, Judge Bork has authored few opinions in civil rights cases, and in the only cases in which he has done so, he wrote in opposition to the civil rights plaintiff. Although of course Judge Bork is entitled to take credit for his votes, judges tend to write opinions, insofar as they can secure an assignment from the presiding or senior judge voting on the same side, in the cases in which they are most interested and about which they care most deeply.

Cases Identified by Judge Bork
As Pro-Civil Rights Cases

Ososki v. Wick, 704 F.2d 1264 (1983)

Judge Bork joined a unanimous opinion which applied plain statutory language in the Equal Pay Act to refuse a request of the Foreign Service for an exemption from the Act.

Laffey v. Northwest Airlines, 740 F.2d 1017 (1984)

Judge Bork joined a unanimous opinion that largely applied the law of the case, established by a previous panel ruling on the case years before, in largely affirming a district court decision granting relief to employment discrimination plaintiffs but denying some relief. The district court decision was overturned in three respects, one favorable to the defendant and two favorable to the plaintiffs.

Nordell v. Heckler, 749 F.2d 47 (1984)

Judge Bork joined a unanimous opinion governing the circumstances in which the time for suing a government agency for employment discrimination is extended by motions for reconsideration by the EEOC. The EEOC apparently thought the plaintiff could sue after reconsideration, and the court agreed, but set a short time limit for seeking reconsideration, which the plaintiff in the case had satisfied.

Jarrell v. Postal Service, 753 F.2d 1088 (1985)

Judge Bork joined a straightforward, unanimous opinion overturning a summary judgment for the agency on the statute of limitations for suing for employment discrimination, because there were unresolved issues of fact, and remanding the case for further consideration of the limitations issue.

Palmer v. Shultz, 815 F.2d 84 (1987)

Judge Bork joined a unanimous opinion which considered at length the law governing employment discrimination actions and the evidence admissible in such cases, vacating a judgment for defendants and remanding for further proceedings.

Emory v. Secretary of Navy, 819 F.2d 291 (1987)

Judge Bork joined a straightforward, unanimous opinion which agreed with the district court that the plaintiff could not be awarded a promotion, which he claimed had been denied for racial reasons, and expressed no views on the constitutional questions involved, but held that the district court erred in ruling that it lacked jurisdiction, and the court might

be able to award some relief if the plaintiff ultimately prevailed on the constitutional claim.

County of Sumter v. United States, 596 F. Supp. 35 (D.D.C. 1984)
555 F. Supp. 694 (D.D.C. 1983)

Judge Bork joined two unanimous opinions of a three-judge court concerning a county's claim that it had complied with the Voting Rights Act. The second opinion is a straightforward application of Supreme Court precedent and finding of certain facts; the first opinion discusses the law at length and rejects most of the plaintiff's arguments, leaving open the issue decided in the second opinion.

Case Identified by Judge Bork
as Anti-Civil Rights Vote

Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 725 (1985), rev'd, 106 S. Ct. 2705 (1986)

Judge Bork wrote a dissent from a denial of rehearing en banc which urged dismissal of a suit by handicapped on ground that Rehabilitation Act does not extend to challenged airline practices

SUMMARY OF CASES CITED BY JUDGE BORK:

Position Taken By Bork[2]	Opin. by Bork	Bork Disagreed w/other judges	Total
Ruled Solely in Favor of Plaintiff:	0	0	5
Ruled Largely in Favor of Plaintiff:	0	0	1
Ruled Partly in Favor of Plaintiff:	0	0	1
Ruled in Favor of Defendant:	1	1	1

[2] Votes on the merits are assigned to a position vis-a-vis the civil rights plaintiff based on the extent to which the view expressed favored or opposed the plaintiff. Votes solely on whether to grant or deny rehearing en banc are assigned a position only insofar as they denigrate the panel opinion.

Cases Not Included in Judge Bork's Testimony

Council of and for the Blind of Delaware Valley v. Regan, 709 F.2d 1521 (1983) (en banc)

Judge Bork joins majority opinion holding that groups and individuals may not sue government for failure to enforce the non-discrimination provisions of the Revenue Sharing Act; dissent would allow suits.

Hohri v. United States, 793 F.2d 304 (1986), vacated, 107 S. Ct. 2246 (1987)

Judge Bork wrote dissent from denial of rehearing en banc of a panel decision that permitted the victims of the internment of Japanese-Americans to proceed with their claims against the government.

King v. Palmer, 778 F.2d 823 (1986)

Judge Bork wrote concurrence in denial of rehearing en banc to emphasize that an issue disposed of in opinion, that a woman may sue over the denial of employment opportunities in favor of another woman who had a sexual relationship with the supervisor, had not been properly challenged by the government, and rehearing denied only for that reason. He thus sought to undercut the precedential effect of the panel opinion's statements.

Vinson v. Taylor, 753 F.2d 141 (1985), aff'd, 106 S. Ct. 2399 (1986)

Judge Bork wrote opinion dissenting from denial of rehearing en banc of a panel opinion holding that employer may be held liable for an environment of sexual harassment even if it has a written policy against discrimination generally and has not been informed of the particular harassment. Judge Bork finds government guidelines on this subject "unpersuasive," and questions propriety of treating sexual harassment as discrimination.

Thompson v. Kennickel, 797 F.2d 1015 (1986)

Judge Bork joined straightforward unanimous opinion that held that post-judgment interest is not available to plaintiffs who win sex-discrimination cases against the federal government.

Carter v. District of Columbia, 795 F.2d 116 (1986)

Judge Bork joined unanimous opinion that overturned jury verdicts granting damages in police brutality case involving alleged racial animus, because evidence of other instances of brutality, which District failed to correct, was improperly given to the jury; however, decision refusing to allow jury to consider claim against District is affirmed.

Josiah-Faeduwor v. Communications Satellite Corporation, 785 F.2d 344 (1986)

Judge Bork joined unanimous opinion that affirmed dismissal of employment discrimination complaint since cases involving tolling of limitations to sue the federal government for discrimination should not be applied to private companies.

Morris v. Washington Metropolitan Area Transit Authority, 781 F.2d 218 (1986)

Judge Bork wrote a unanimous opinion that held that Metro may not be sued for employment discrimination because of constitutional doctrine of sovereign immunity; member states have conferred their own immunity on it. A concurring opinion emphasized some "special facts" about the case.

Cope v. McPherson, 781 F.2d 207 (1985)

Judge Bork joins unanimous opinion affirming dismissal of age discrimination claim; plaintiff properly barred from introducing certain evidence because of failure to provide sufficient advance notice.

California Ass'n of Physically Handicapped v. FCC, 778 F.2d 823 (1985)

Judge Bork joined a majority opinion holding that group of handicapped individuals lacked standing to sue to compel FCC to enforce broadcaster's duties vis-a-vis handicapped citizens (both programming and hiring). Dissent would grant standing.

Ralis v. RFE/RL, Inc., 770 F.2d 1121 (1985)

Judge Bork joined unanimous opinion affirming dismissal of age discrimination claim against Radio Free Europe and Radio Liberty because, although Supreme Court decision applied other civil rights law amendments retroactively, amendment extending age discrimination act to employees overseas should not be applied retroactively.

Stebbins v. Nationwide Mut. Ins. Co., 757 F.2d 364 (1985)

Judge Bork joins majority opinion reversing dismissal of employment discrimination suit for lack of venue for lack of explanation by the district court, but majority indicates support for another district court decision in Hayes case that could bar venue in this case. Concurring opinion attacks application of decisions in Hayes and other cases.

Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405 (1985)

Judge Bork joins unanimous opinion that affirmed in part and reversed in part a decision dismissing an employment discrimination claim.

Nathan v. Smith, 737 F.2d 1069 (1984)

Judge Bork wrote a majority opinion that reversed a district court order compelling Justice Department to conduct a preliminary investigation into allegations that federal agents collaborated with the Ku Klux Klan to produce racial violence in Greensboro, North Carolina. Concurring opinion stated that case should be confined to its particular facts.

Von Aulock v. Smith, 720 F.2d 176 (1983)

Judge Bork wrote a unanimous opinion that dismissed a suit against the EEOC contending that one of its interpretive bulletins was contrary to requirements of age discrimination act, and encouraged employers to violate their rights under that act; Judge Bork dismissed for lack of standing.

Cosgrove v. Smith, 697 F.2d 1125 (1983)

Judge Bork dissented from majority opinion that overturned a district court decision dismissing discrimination claims by male federal prisoners, claiming disparate treatment with respect to parole standards on grounds of both sex and their imprisonment in a federal rather than a D.C. jail. Judge Bork would have upheld dismissal of part of the discrimination claim; he would allow the sex discrimination claim to proceed because the district court had not analyzed it sufficiently, although he expressed doubt about its validity.

Cutts v. Fowler, 692 F.2d 138 (1982)

Judge Bork joined unanimous opinion upholding anti-nepotism rule against claim by woman that she had lost employment rights when her husband was put in charge of a department where she worked.

Tarpley v. Greene, 684 F.2d 1 (1982)

Judge Bork joined a unanimous opinion that affirmed in part and reversed in part the dismissal of a police brutality claim (unclear whether case involved allegations of racial or other animus, but included in this list in order to err on side of fairness to Judge Bork's assertions).

The foregoing cases include only cases in which plaintiffs sought to enforce the constitution or civil rights statutes. Other significant cases in which Judge Bork wrote opinions undercutting women's or gay rights include OCAW v. American Cyanamid Co., 741 F.2d 444 (1984), Planned Parenthood v. Heckler, 712 F.2d 650 (1983), and Dronenburg v. Zech, 741 F.2d 1388 (1984). Also not included is Doe v. Weinberger, 820 F.2d 1275 (1987), where Judge Bork joined a unanimous opinion ruling partly in favor of a gay plaintiff under a federal personnel statute.

SUMMARY OF CASES OMITTED BY JUDGE BORK

Position Taken By Bork	Opin. by Bork	Bork Disagreed w/other judges	Total
Ruled Solely in Favor of Plaintiff:	0	0	1
Ruled Largely in Favor of Plaintiff:	0	1[3]	1
Ruled Partly in Favor of Plaintiff:	1	1[4]	2[5]
Ruled in Favor of Defendant:	6	6	14

[3] Other judge's view was more in favor of plaintiff than Judge Bork's view (Stebbins).

[4] Other judges' views were more pro-plaintiff than Judge Bork's view (Cosgrove).

[5] Includes the Tarpley and Cosgrove cases.

STATISTICS LIE: RESPONSE TO STATISTICS FREQUENTLY CITED BY THE WHITE HOUSE TO SUPPORT NOMINATION OF JUDGE BORK

The four statistics most frequently cited by the White House in support of Judge Bork's nomination are that Judge Bork has (1) sided with the majority on the D.C. Circuit 94% of the time; (2) sided with the liberal members of that court between 74% and 90% of the time; (3) never been reversed by the Supreme Court; and (4) agreed with Justice Powell in 9 out of 10 cases. For the reasons discussed below, each of these statistics is misleading and ultimately unimportant.

ASSERTION: **On the D.C. Circuit, Judge Bork sided with the majority 94% of the time.**

RESPONSE: **86% of the decisions in which Judge Bork participated were unanimous. Therefore, it is totally unremarkable that he sided with the majority 94% of the time.**

EXPLANATION: 96% of all appellate court decisions (from all Circuits) during 1985-86 were unanimous, according to a comprehensive study by the Columbia Law Journal. 103 Col. L.J. 122 n.77. Only 86% of the decisions in which Judge Bork participated during his 5 years on the Court were unanimous, and therefore Judge Bork disagreed with at least one other judge significantly more frequently that the average appellate judge. If unanimous cases are excluded, then Judge Bork dissented in 18 of the 56 cases in which he participated, or 32% of the time. Since most of these split cases were decided by three-judge panels with one judge dissenting, one would expect the typical judge to dissent about 33% of the time.

ASSERTION: **Judge Bork sided with the liberals on the D.C. Circuit 74% to 90% of the time.**

RESPONSE: **The same answer applies. Since 86% of the decisions were unanimous, it is totally unremarkable that Judge Bork sided with the liberals on the court a high percentage of the time. But when unanimous cases are excluded, the picture changes dramatically -- Judge Bork sided with the five most liberal members of the court only 6% to 19% of the time.**

EXPLANATION: See explanation above. The most relevant set of statistics are those for decisions which were not unanimous -- split decisions in which one judge dissented. Those are the cases most likely to go to the Supreme Court. The four D.C. Circuit decisions in which Judge Bork participated that were granted full review by the Supreme Court were all split decisions.

EXHIBIT B

ASSERTION: None of Judge Bork's majority opinions was reversed by the Supreme Court.

RESPONSE: The Supreme Court reviews only a handful of cases decided by the Circuit courts and has never reviewed a case in which Judge Bork wrote the majority opinion. Therefore, it is hardly surprising that none of his opinions has been reversed.

EXPLANATION: The Supreme Court is asked to review thousands of cases every year from federal and state courts, but it only hears argument in about 150 cases. For example, during the 1986-87 term, the Court granted review in 145 cases, only 5 of which came from the D.C. Circuit. Judge Bork probably participated in only 2 or 3 of these. The vast majority of the decisions made by any judge are not reviewed by the Supreme Court because the losing party did not seek review or because the Court did not think the case was important enough to merit its attention. Therefore, the fact that the Supreme Court did not review a case in no way supports a claim that the Court approved the lower court's decision.

The White House Briefing book (July 27, 1987) identifies 10 cases in which Judge Bork participated that have been reviewed by the Supreme Court. In none of these did Judge Bork write the majority opinion.

ASSERTION: Justice Powell agreed with Judge Bork in 9 out of 10 cases that they both considered.

RESPONSE: Actually, Judge Bork voted on the merits of only 4 cases that were ultimately reviewed by Justice Powell, and they agreed 3 times. The number is too small to be meaningful.

EXPLANATION: The White House Briefing Book identifies only 4 cases that Judge Bork heard on the merits as an appellate judge that were reviewed by the Supreme Court. Justice Powell agreed with him on 3 occasions. One of the remaining cases was decided by a three-judge panel in the district court and was affirmed by the Supreme Court without full review. In the other 5 cases reviewed by the Supreme Court, Judge Bork's sole role was to vote on whether the case would be heard by the full D.C. Circuit. In each of these cases, Judge Bork offered his opinion on the merits, although he had not participated in the argument or consideration of the case. Justice Powell and Judge Bork agreed in 4 of these cases.

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August 24, 1987

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October 5, 1987

STATEMENT FOR THE WRITTEN RECORD OF ALAN B. MORRISON CONCERNING NADER v. BORK AND THE NOMINATION OF JUDGE ROBERT H. BORK TO AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

I am submitting this statement to provide the Committee with additional information regarding the case of Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), in which I was the principal attorney for the plaintiffs. In that case the district court declared that the firing of Archibald Cox was unlawful. While I have other concerns about the nomination of Judge Bork, this statement is intended to supplement, and in some respects correct the testimony that the Committee has heard on this matter.

First, I wholeheartedly endorse the testimony and the conclusions of Henry Ruth and George Frampton in their appearances before the Committee on September 29, 1987. As they made clear, the most disturbing thing about Judge Bork's firing of Archibald Cox is what it shows about his views of executive power and his willingness to disregard a solemn compact made between the President of the United States and his Attorney General nominee, on one side, and the Senate of the United States on the other. In that compact Executive Branch promises regarding the independence of the Special Prosecutor were made in order to obtain confirmation of the Attorney General and to stave off the passage of legislation providing for a statutory Special Prosecutor. A reading of the transcript of the 1973 Senate

hearings leaves no doubt that President Nixon was fully informed concerning the guidelines that his Attorney General nominee had submitted to the Committee and that he concurred with them. Hence, the notion that there was a purely private or personal deal between Elliot Richardson and the Senate simply does not withstand analysis.

Second, one aspect of the Special Prosecutor regulations which has not received adequate attention is the final section entitled "Duration of assignment," which reads as follows:

> The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

Thus, the challenge to the firing of Archibold Cox in Nader v. Bork did not simply rest on the part of the regulation prohibiting the firing of the Special Prosecutor except for "extraordinary improprieties," but also on the prohibition on abolition of the Office. Obviously, the latter provision was of enormous significance since it would not matter if the Special Prosecutor could not be fired if the Office could be abolished at the whim of the Attorney General.

In our district court brief in Nader v. Bork, a copy of which is attached for inclusion in the written record, we advanced three separate, but related reasons why the attempted abolition of the Office was unlawful: (1) the regulation forbade the abolition, and there was no reason why that regulation should not be enforced; (2) if the Office could be abolished at all, it

could only be abolished by an Attorney General, who, like Elliot Richardson, had been confirmed for that position by the Senate, which Mr. Bork had not; and (3) all actions of federal agencies must be taken for proper reasons, and it was wholly improper for Mr. Bork to have acceded to the President's order to abolish the Office when the sole purpose of that order was to enable the President to avoid honoring a final court order directing him to turn over the tapes to the grand jury. While the district court did not rule on the legality of the attempted abolition of the Office, Judge Bork's defense is that the President had the power to abolish the Office, notwithstanding the regulation, the compact with the Senate, and the President's improper reason for doing so. (Tr. 9/17/87, am, p. 88; Tr. 9/18/87, pm, p. 95). Once again, this view of executive power is far more frightening than is the fact that a court decided that Judge Bork carried out an unlawful order of the President in firing Archibald Cox.

Third, in his testimony, Judge Bork gave the impression that the lower court decision was not overruled because it became moot as soon as the new Special Prosecutor was appointed. As he described the circumstances, "I never got my chance to review that ruling on appeal which I very much wanted." (Tr. 9/18/87, pm, p. 94). See also Tr. 9/17/87, am, p. 65: if there is no longer a live controversy, "the party who appeals -- and that was me -- does not get his day in the appellate court." That is plainly contradicted by certain objective facts as to which there can be no dispute, not the least of which is that the new Special

Prosecutor was already appointed before the district court issued its ruling.

But there is more. The decision of the district court was entered on November 14, 1973, but no notice of appeal was filed until January 11, 1974, virtually the last day on which an appeal would be timely. Thereafter, instead of moving for expedition, or summary reversal, or even filing a brief immediately, as litigants often do, the Justice Department did nothing of the sort. In fact, it sought three separate extensions of time to file its brief and did not eventually file its brief until early July 1974. Thereafter, in early August 1974, in light of the July 24, 1974 decision in United States v. Nixon, 418 U.S. 683, which ordered the President to turn over all of the tapes, we moved to dismiss the appeal on the ground that there was no longer any conceivable likelihood that President Nixon would order anyone to fire the Special Prosecutor or to abolish the Office in order to avoid having to turn over tapes. Even after President Nixon resigned, however, the Court of Appeals did not dismiss the case as moot, and we were required to file our brief on the merits. In August 1975, after the case had been scheduled for oral argument, the panel to which the case was assigned recognized that the case was indeed moot and hence dismissed the appeal. Surely, if Judge Bork had believed that he had a strong case on appeal and was intent on vindicating his position as he now states, he would have moved the case expeditiously in the Court of Appeals. But he did not do so.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action 1954-73
	)	
ROBERT H. BORK,	)	
Acting Attorney General	)	
of the United States,	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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October 29, 1973

Attachment to
Statement of Alan B Morrison

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

RALPH NADER, Plaintiff,	)	
v.	)	Civil Action 1954-73
ROBERT H. BORK, Acting Attorney General of the United States, Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF

MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This action challenges the legality of the attempts by the defendant to discharge Archibald Cox as the Special Watergate Prosecutor and to disband the Office of the Watergate Special Prosecution Force. Plaintiffs[1] are all citizens, taxpayers, and attorneys; in addition, plaintiff Moss is a United States Senator, and plaintiffs Waldie and Abzug are Members of the House of Representatives. The complaint prays for declaratory and injunctive relief against the defendant, and this memorandum is submitted in support of plaintiffs' motion under

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[1] Submitted simultaneously with this motion is a motion for leave to amend the complaint and add additional parties. This amended complaint raises no new issues, and most of the changes simply reflect the addition of the new parties and the changes in circumstances that have occurred since the original complaint was prepared. For the convenience of defendant and the Court, we will refer to the amended complaint in this memorandum in lieu of the original complaint and include facts and arguments related to the parties in the amended complaint.

Rule 65(a)(1) of the Federal Rules of Civil Procedure for a preliminary injunction. Because of the extraordinary public interest in having this matter resolved at the earliest possible time, plaintiffs ask this Court to consolidate the hearing on the motion for the preliminary injunction with a final hearing, as authorized by Rule 65(a)(2).

In a nutshell, the facts of this case are as follows:

--In May 1973, Elliot Richardson was confirmed by the Senate to be Attorney General after he had, with the authorization of the President, worked out a detailed agreement with the Judiciary Committee concerning the appointment of a special prosecutor to conduct the so-called "Watergate" investigation and prosecutions;

--Immediately after his confirmation, Attorney General Richardson formally appointed Archibald Cox to be Special Prosecutor and promulgated departmental regulations establishing the Office of Watergate Special Prosecution Force and embodying explicit rules governing its conduct which were identical to the terms agreed upon during his confirmation hearings;

--These detailed regulations authorized the Special Prosecutor to challenge claims of executive privilege in court actions, declared that he could only be dismissed for committing "extraordinary improprieties", and provided that the office would continue to perform its functions until its job was completed or until another time agreed upon by the Special Prosecutor and the Attorney General;

--Despite these binding regulations, defendant, who became Acting Attorney General after the forced resignations of the Attorney General and the Deputy Attorney General, purportedly fired Special Prosecutor Cox and abolished his office when Cox declined to accede to a Presidentially proposed "compromise" of a court action concerning access to tapes and other memoranda of Presidential conversations, or to comply with a Presidential directive not to make any attempts through future judicial proceedings to obtain similar materials.

The complaint alleges that two separate actions of the defendant were unlawful. The first of these, the defendant's discharging of Archibald Cox, is alleged to be unlawful because

there was then in existence a validly promulgated regulation of the Department of Justice which permitted the firing of Mr. Cox only for "extraordinary improprieties on his part", and there are conceded to be none in this case. Moreover, because of defendant's limited authority as an Acting Attorney General, he lacked the power to discharge the Special Prosecutor.

The second action of the defendant claimed to have been illegal is the abolition of the Office of the Special Prosecutor. Plaintiffs contend that this order is unlawful since the regulation which created the Office specifically provides for its continuation until the Special Prosecutor determines that his work is concluded or until a date mutually agreed upon between the Attorney General and himself. Moreover, the attempted abolition was invalid because the defendant, as a Solicitor General who has become Acting Attorney General, has no authority to effect wholesale changes in the organizational structure of the Department of Justice. Further, plaintiffs argue that the special circumstances surrounding the appointment of Mr. Cox and the creation of his office, also act to preclude a Solicitor General who becomes Acting Attorney General from making a drastic change of this kind. Finally, in this connection, defendant's decision to abolish the Office was unlawful because it was made without any independent rational basis and was undertaken solely because of the direction by the President. Since the defendant would have been fired from his job unless he agreed to both fire Mr. Cox and abolish the Office, his decision to do so was unlawfully coerced and cannot be sustained.

Coercion is of particular importance in this case where the President who directed the abolition of the office is--along with many of his former cabinet officers and closest associates--one of the persons under investigation. Plaintiffs contend that the totality of these circumstances deprives the Solicitor General of the authority to abolish the Office.

In our final point we demonstrate that there is a need for immediate action in this case, primarily because the public interest requires that the legality of defendant's action be determined at the earliest possible date. It is apparent that so long as a cloud exists over the special prosecutor's office, it cannot be run in an effective manner, whether it is within the Criminal Division of the Justice Department or exists as an independent office. Plaintiffs also contend that their own activities are hampered by the uncertainty that persists with respect to the legality of the firing of the Special Prosecutor and the abolition of his office, and that these interests will continue to be severely hindered unless preliminary relief is afforded.

STATEMENT OF FACTS

(1) Events Leading to the Creation of the Office of the Special Prosecutor and The Appointment of Archibald Cox As Special Prosecutor

On April 30, 1973, Richard G. Kleindienst resigned from the office of Attorney General of the United States, citing as the ground for his resignation his close personal and professional relationship with several individuals then being investigated by the Department of Justice. On the following day, the President submitted to the Senate the nomination for Attorney General of

concluded that he should appoint a special prosecutor; he added that he thought it desirable to have his designee for the position appear before the Committee and be questioned so that the Senate could be satisfied as to the special prosecutor's qualifications.[6]

During the course of the confirmation hearings, several issues were raised which bear on the subject matter of this litigation. These are discussed more fully in Point I of the Argument, but they are deserving of brief mention here. First, the Committee evidenced a strong conviction that the activities of the special prosecutor should be independent of the Department of Justice and of the White House, subject only to the power of the Attorney General to discharge the special prosecutor in extreme circumstances.[7] Second, the Committee insisted that the special prosecutor be subject to removal by the Attorney General only in the most unusual circumstances.[8] Third, the

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6 Id. at 4-5.

7 See, e.g., id. at 5, 15, 17, 36, 45-47, 94, 130-131, 144-147, 177. Members of the Committee were especially insistent that the Watergate prosecution not be under the direction of Henry E. Petersen, the Assistant Attorney General in charge of the Criminal Division. See, e.g., id. at 152-153.

8 Senator Ervin stated early in the hearings, "[h]e should have assurance that he would not be subject to removal from his position except for malfeasance in office." See also id. at 38 and 137-139, as well as the prescient, if overly optimistic exchange between Senator Tunney and Secretary Richardson discussing the possibility of the Attorney General's being pressured by the President to dismiss the special prosecutor, id. at 72-73.

Committee demanded assurance that the special prosecutor would have the authority to seek access to White House files and to contest in court any Presidential claims of executive privilege.[9]

One of the chief aims of both Secretary Richardson and Committee members during the course of the hearings was to agree upon definite guidelines which would govern the conduct of the special prosecutor's office and which would set forth in writing their formal understanding regarding, among other things, the three issues discussed above. On May 21, 1973, Secretary Richardson presented to the Committee a set of guidelines which he had formulated after an exchange of correspondence with Senator Stevenson.[10] The guidelines provided generally that a special prosecutor would be appointed to serve within the Department of Justice and to investigate Watergate-related matters. They specified that the special prosecutor would have the authority, inter alia, to determine whether to contest any assertion of executive privilege and whether application should be made to any federal court for subpoenas or other court orders. The guidelines stated that "[i]n exercising this

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9 See generally id. at 40-42, 52, 57-58, 68-69, 76-77, 79, 159.

10 Hearings at 144-146. Such guidelines were first proposed in a Senate resolution offered by Senator Stevenson and others, and were later the subject of correspondence between Secretary Richardson and Senator Stevenson. See 119 Cong. Rec. S 9713-15 (daily ed. May 23, 1973).

authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the special prosecutor's decisions or actions." The guidelines went on to state, with respect to dismissal, that "[t]he special prosecutor will not be removed from his duties except for extraordinary improprieties on his part". Under the heading "Duration of Assignment" the guidelines provided: "The special prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as in his judgment, he has completed them or until a date mutually agreeable between the Attorney General and himself."

On that same date, Secretary Richardson presented to the Committee his designee for the office of special prosecutor, Professor Archibald Cox of the Harvard Law School. Professor Cox was questioned closely by members of the Committee with respect to his understanding of and satisfaction with the guidelines proposed by Secretary Richardson. Both Professor Cox and Secretary Richardson were specifically questioned with respect to the Attorney General's power to govern the conduct of the office of special prosecutor. Both stated that it was their understanding that the Attorney General would have no control over the special prosecutor, except his power to dismiss the special prosecutor if he committed extraordinary improprieties.[11]

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[11] Hearings at 146, 149-150, 155-156, 177-178.

Both Secretary Richardson and Professor Cox were also questioned with respect to the special prosecutor's authority to challenge claims of executive privilege with respect to the documents or testimony of executive officials, and espeicially of the President. Their understanding with respect to the challenging of claims of executive privilege was embodied in Secretary Richardson's statement that:

> "for purposes of the Watergate investigation and all the other related matters, if such an issue should arise, the President will be represented by counsel on one side of that issue and * * * the special prosecutor should assert his claim to obtain the information or the evidence on the other, and that if that cannot be resolved otherwise, then in my judgment, the issue would have to be resolved by a court.[12]

Having hammered out what it considered to be a workable set of guidelines for the conduct of the office of special prosecutor, the Committee finally sought and obtained the assurance of Secretary Richardson that upon his confirmation as Attorney General these guidelines would be made legally binding on the Department of Justice through their publication in the Federal Register.[13]

The hearings were concluded on May 22 and Secretary Richardson's nomination was favorably reported to the floor of the Senate on May 23. In recommending the confirmation of Secretary Richardson, Senator Robert Byrd, the floor manager of the nomination, discussed the qualifications of Professor

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12 Id. at 159. See also id. at 179-182.

13 Id. at 200-01 (colloquy between Secretary Richardson and Senator Mathias).

Cox as much as he did those of Secretary Richardson, and he made it clear that his recommendation that Richardson be confirmed was based primarily on the agreement that had been worked out between the nominee and the Judiciary Committee.[14] With this agreement having been presented to the Senate, Secretary Richardson was confirmed as Attorney General on May 23 by a margin of 82-3. He was sworn in as Attorney General on May 28, 1973.

Pursuant to his agreement with the Senate, Attorney General Richardson on May 31, 1973 promulgated and published Order 517-73, effective May 25, 1973, amending Justice Department regulations to create the Office of Watergate Special Prosecution Force.[15] The regulations incorporated an appendix listing the duties and responsibilities of the Special Prosecutor, which was identical in all material respects to the guidelines presented by Richardson to the Senate Judiciary Committee on May 21, 1973.[16]

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14 119 Cong. Rec. S 9709 (daily ed. May 23, 1973). See also id. at S 9711 (Remarks of Senator Kennedy), S 9712 (Remarks of Senator Javits), and S 9712-15 (Remarks of Senator Stevenson).

15 38 Fed. Reg. 14688 (June 4, 1973), 28 C.F.R. §§ 0.1, 0.37.

16 Also on May 31, 1973, Attorney General Richardson promulgated Internal Order 518-73, which was not published in the Federal Register, designating Special Prosecutor Archibald Cox the Director of the Watergate Special Prosecution Force, effective May 25, 1973. Additional orders were promulgated by Attorney General Richardson over the next few months to further clarify the authority of the Special Prosecutor. See 38 Fed. Reg. 18877 (July 16, 1973); 38 Fed. Reg. 21404 (Aug. 8, 1973).

(2) Events Leading To The Firing Of Special Prosecutor Cox And The Abolition Of The Office Of The Special Prosecutor

On July 16, 1973 it became known publicly for the first time that for approximately the past three years every conversation in the Oval Office of the President, the Executive Office Building office of the President, and the White House Cabinet Room had been tape recorded by secret equipment with the knowledge of only a few persons.[17] On July 23, Special Prosecutor Cox, acting on behalf of a grand jury empaneled by this Court, caused to be issued a subpoena to President Nixon requiring the production for the grand jury of certain tape recordings and documents pertaining to conversations alleged to have been recorded. In a letter to the Court dated July 25, the President advised that the materials sought would not be provided. Upon application of the Special Prosecutor, Judge Sirica issued a show-cause order, in response to which counsel for the President filed a special appearance contesting the Court's jurisdiction and raising primarily the defense of executive privilege. On August 29, Judge Sirica entered an opinion and order requiring the production of the subpoenaed materials for his in camera examination so that he could determine which portions, if any, were privileged.[18]

Both the President and the Special Prosecutor challenged the order of Judge Sirica by filing separate petitions for a writ of mandamus in the United States Court of Appeals for the

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[17] See Hearings Before the Select Sen. Comm. on Presidential Campaign Activities on Watergate and Related Activities, 93rd Cong., 1st Sess. 2073 et seq. (1973).

[18] In re subpoena to Nixon, 360 F. Supp. 1 (D.D.C. 1973).

District of Columbia Circuit. On October 12, 1973, a majority of the judges of that Court, sitting en banc, affirmed Judge Sirica's order in most respects. The Court ordered that the case be returned to the District Court for further proceedings consistent with its opinion, but it provided that the issuance of its mandate would be stayed for five days (until Friday, October 19) to permit the seeking of Supreme Court review of the issues raised in the petitions.[19]

Beginning on Monday, October 15, the President initiated efforts to resolve the controversy extrajudicially.[20] He directed Attorney General Richardson to approach Special Prosecutor Cox with a proposal whereby the court would be given a non-verbatim record of the tapes verified by Senator John Stennis on the condition that, among other things, Cox not seek any other similar tapes or memoranda in judicial proceedings.[21] On Wednesday, October 17, Attorney General Richardson prepared and submitted to Special Prosecutor Cox a proposal embodying most of the President's suggested terms, except that the Attorney General deleted the prohibition against instituting further judicial proceedings seeking other tapes because he considered it to be undesirable.[22]

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[19]See Nixon v. Sirica, ___ F.2d ___ (D.C. Cir. No. 73-1962, decided Oct. 12, 1973), reprinted at 119 Cong. Rec. S 19303 et seq. (daily ed. Oct. 18, 1973).

[20]Transcript of Press Conference of Former Attorney General Richardson, October 24, 1973, p. 3; a copy of the transcript is submitted as Exhibit 14 to the Affidavit of W. Thomas Jacks filed herewith [hereinafter referred to as "Richardson Press Conference"]. [Exhibits to this affidavit will hereinafter be referred to as "Jacks Exhibit ___"].

[21]See Richardson Press Conference [Jacks Exhibit 14] at 3-4. A copy of Attorney General Richardson's proposal is submitted as Jacks Exhibit 1.

[22]Richardson Press Conference at 4.

On Thursday, October 18, Special Prosecutor Cox prepared and submitted to Attorney General Richardson a memorandum[23] in which he voiced several concerns with the proposal and concluded by saying:

> The Watergate Special Prosecution Force was established because of a widely felt need to create an independent office that would objectively and forthrightly pursue the prima facie showing of criminality by high Government officials. You appointed me, and I pledged that I should not be turned aside. Any solution I can accept must be such as to command conviction that I am adhering to that pledge.

Also on Thursday, the 18th, the President's counsel, Charles Alan Wright, addressed a letter to Special Prosecutor Cox in which he stated that while some of Cox's comments on the Attorney General's proposal were negotiable, certain other of his comments departed "so far from that proposal and the purpose for which it was made that we could not accede to them in any form."[24]

On Friday evening, the office of White House Press Secretary released a statement by the President in which he said that he had decided not to appeal the Court of Appeals decision, but had chosen instead to propose a compromise to Special Prosecutor Cox, which had been rejected. The President added that he had "felt it necessary to direct [Cox] as an employee of the executive

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[23] A copy of this memorandum is submitted as Jacks Exhibit 2.

[24] A copy of this letter is submitted as Jacks Exhibit 3. On Friday, October 19, the day on which the stay of the Court of Appeals was to expire, Special Prosecutor Cox and Attorney Wright had still another exchange of correspondence, but were still unable to resolve their differences. Copies of these two letters are submitted as Jacks Exhibits 4 and 5.

branch, to make no further attempts by judicial process to obtain tapes, notes, or memoranda of Presidential conversations."[25]

Later on Friday evening, the Special Prosecutor issued a statement in which he said that he considered the President to be refusing to comply with the orders of the courts and that he would present his objections to the courts and would abide by their decision.[26] He added that to comply with the President's order not to seek to obtain through judicial proceedings any other materials relating to presidential conversations would be to violate his promise to the Senate and the nation, something which he would not do. The next day, Saturday, October 20, Special Prosecutor Cox held a press conference in which he reiterated his inability to agree to the proposal made to him or to abide by the President's direction of Friday evening that he make no further attempts through judicial proceedings to obtain tapes, memoranda or other documents pertaining to presidential conversations.[27]

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[25]Copies of the President's statement and the White House press release are submitted as Jacks Exhibit 7. Just before issuing this statement, President Nixon sent a letter to Attorney General Richardson directing him to instruct Special Prosecutor Cox accordingly and expressing his regret for "the necessity of intruding, to this very limited extent, on the independence that I promised you * * * when I announced your appointment * * *" [A copy of the President's letter is submitted as Jacks Exhibit 6]. Attorney General Richardson responded to the President's letter the next day, stating that the President's direction was an intrusion on the independence promised him by the President and that for him to carry out the order would be to violate a number of the specific promises made by him to the Senate. [A copy of this reply letter is submitted as Jacks Exhibit 9].

[26]A copy of the Special Prosecutor's statement of October 19 is submitted as Jacks Exhibit 8.

[27]A copy of a transcript of Special Prosecutor Cox's press conference of Saturday, October 20, is submitted as Jacks Exhibit 10.

After that press conference, the President decided that the Special Prosecutor should be fired, and he directed Attorney General Richardson to do so. Richardson declined, and in a letter to the President, he repeated much of what he had said in his earlier letter of that same day[28] and stated that he had "been obliged to conclude that circumstances leave me no alternative to the submission of my resignation as Attorney General of the United States."[29] Upon Attorney General Richardson's resignation, the President next directed Deputy Attorney General William D. Ruckelshaus to fire Special Prosecutor Cox. The Deputy Attorney General declined to do so, and submitted a letter resigning his office.[30]

The Attorney General and Deputy Attorney General having declined to carry out his instructions and having resigned, the President turned next to the defendant, who was then Solicitor General of the United States, and who thereupon became Acting Attorney General pursuant to 28 U.S.C. § 508(b) and 28 C.F.R. § 0.132(a). In a letter to the defendant dated October 20th, the President stated, in pertinent part:

> In his press conference today Special Prosecutor Archibald Cox made it apparent that he will not comply with the instruction I issued to him, through

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[28]This letter is discussed in note 25, supra.

[29]A copy of Attorney General Richardson's letter of resignation was released by the White House on October 20th; a copy of that release is submitted as Jacks Exhibit 11.

[30]Deputy Attorney General Ruckelshaus' reasons for resigning were discussed by him in a press conference on Tuesday, October 23, a transcript of which is submitted as Jacks Exhibit 15.

> Attorney General Richardson, yesterday. Clearly the Government of the United States cannot function if employees of the Executive Branch are free to ignore in this fashion the instructions of the President. Accordingly, in your capacity of Acting Attorney General, I direct you to discharge Mr. Cox immediately and to take all steps necessary to return to the Department of Justice the functions now being performed by the Watergate Special Prosecution Force.[31]

That evening defendant signed a letter to Special Prosecutor Cox which stated that he had assumed the duties of Acting Attorney General, and that "I am, as instructed by the President, discharging you, effective at once, from your position as Special Prosecutor, Watergate Special Prosecution Force."[32]

A few minutes after the firing of Special Prosecutor Cox, F.B.I. agents acting on directions from someone in the White House, occupied and "sealed off" the offices of the Attorney General, the Deputy Attorney General, and the Watergate Special Prosecution Force. Prosecution Force staff attorneys were not permitted to remove any papers from their offices, either by hand or by mail. The F.B.I. agents were replaced on Sunday by U.S. marshals, who acted on instructions from defendant, but normal security procedures were not reinstated until Monday, October 22.[33] Also on Monday, the 22d, the defendant announced

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[31]The text of the President's letter to the defendant was released by the Office of the White House Press Secretary on October 20th; a copy of that release is submitted as Jacks Exhibit 12.

[32]A copy of this letter is also part of Jacks Exhibit 12.

[33]See Motion for Protective Order, In Re Investigations By June 5, 1972 Grand Jury and August 13, 1973 Grand Jury (D.D.C. filed Oct. 25, 1973) (copy submitted as Jacks Exhibit 17).

that he was placing Assistant Attorney General Henry E. Petersen in charge of the Watergate case.[34]

On Tuesday, October 23, 1973, the day this action was filed, defendant issued Order No. 546-73, 38 Fed. Reg. 29466 (Oct. 25, 1973), which purported to abolish the Office of the Special Prosecutor effective October 21, and to revoke all prior orders and regulations pertaining thereto, including the regulations which had been promulgated by Attorney General Richardson on May 31st establishing the office and setting forth the agreed upon guidelines under which it would be conducted.

(3) The Aftermath Of The Firing Of Special Prosecutor Cox And The Abolition Of The Office Of Special Prosecutor

The events of October 19th and 20th sent a shock wave through this nation which has not yet subsided. Beginning on Saturday night, members of Congress were flooded with letters, telegrams, and telephone calls from their constituents, most calling for the impeachment of the President.[35] When the House of Representatives convened on Tuesday, October 23rd, over 20 resolutions[36] were introduced calling for the initiation of impeachment proceedings of some sort, including resolutions by plaintiffs Waldie

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[34]See note 7, supra; In a written statement released to the press, Bork added that "[m]y job is to keep the Department operating effectively until such time as the President nominates and the Senate confirms a new Attorney General. In my capacity as Acting Attorney General, I hope to preserve for that future Attorney General the programs and initiatives begun by Elliot Richardson." A copy of the Acting Attorney General's written statement is submitted herewith as Jacks Exhibit 13.

[35]See the affidavit of plaintiff Moss, which is submitted herewith.

[36]See 119 Cong. Rec. H 9356-57 (daily ed. Oct. 23, 1973).

and Abzug; such resolutions were sponsored by over 65 members of the House. A large number of other bills and resolutions were introduced in both houses proposing various mechanisms for reestablishing a Special Prosecutor's office.[37] The Judiciary Committees of both houses announced that they would commence hearings on such legislation beginning on Monday, October 29th. Some members of those two committees, as well as of the respective full houses of Congress, who believe that the dismissal of the Special Prosecutor and the abolition of his office were illegal, are uncertain whether they should expend their energies and resources and cast their votes for new legislation when they believe the former structure to have been illegally demolished.[38] At the same time, these members consider the reestablishment of some type of independent prosecutorial force to be of the utmost importance, and they are hesitant to withhold their support of such legislation because of the uncertainties that exist with respect to Mr. Cox's status. An expeditious disposition of this case will provide them with the guidance they need to perform their legislative duties.

Indecision and uncertainty have also been the order of the day within the Department of Justice generally, and the Office of the Special Prosecutor in particular. During the first thirty-six hours following the firing of the Special Prosecutor, members of the Force were severely inhibited in the discharge of their duties by the presence of F.B.I. agents and U.S. marshals

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[37] See, e.g., S. 2603; S. Res. 191, H.R. 11043, H.R. 11067, H.R. 11075, H.R. 11081, H.J. Res. 784-788, 791-793, H. Res. 632, H. Con. Res. 366, 93d Cong., 1st Sess. (1973).

[38] See generally the affidavit of plaintiff Moss submitted herewith.

who, on orders from the White House and the defendant, respectively, refused to permit the removal of any papers from the offices. Although that situation has normalized, uncertainty continues to exist. As recently as October 25th, members of the Force observed in papers filed with Judge Sirica that "[t]he status of the records developed by the Watergate Special Prosecution Force and the responsibility for the security of these materials is * * * uncertain."[39] In addition, the conclusion is inescapable that the work of the Force will be hampered until this controversy is resolved. Potential defendants in criminal cases and their attorneys will be reluctant to engage in any kind of plea bargaining until it is clear who has final authority to speak for the United States.

This uncertainty in both the Congress and the Department of Justice can only have been exacerbated by the President's announcement on Friday, October 27, that "in consultations * * * we've had in the White House today, we have decided that next week the Acting-Attorney General, Mr. Bork, will appoint a new special prosecutor for what is called the Watergate matter."[40] While it remains unclear what powers this new special prosecutor would have, President Nixon did state that "[w]e will not provide Presidential documents to a special prosecutor."[41]

In short, until this Court rules whether the firing of Special Prosecutor Cox and the abolition of his office were legal,

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[39]See note 33, supra.

[40]New York Times, Oct. 27, 1973, at 14, a copy of which is submitted as Jacks Exhibit 19.

[41]Id.

neither the Congress, the Justice Department, nor those who are the subjects of investigation can make truly informed decisions about their future courses of action. As time passes without resolution of this issue, the task of righting the wrong which has been done grows more confusing and more difficult.

Finally, it cannot be overlooked that perhaps the greatest harm occasioned by the traumatic events of October 19-20 is the harm that is inflicted upon the American people when they witness the arbitrary dismissal of a highly respected public servant and the forced resignation of two other eminently regarded public officials who refused to violate solemn promises that they had made. Public distrust of government, already at an ebb, appears to be at its lowest point in recent memory.[42] This lack of confidence will continue, and perhaps worsen, so long as there remains unanswered the question being asked by many--the question whether defendant violated the law in firing Special Prosecutor Cox and abolishing his office. Only an expeditious resolution of this issue can help to restore the citizens' lost confidence in their government and to quiet the raging storm which was unleashed by the abrupt dismissal of Archibald Cox.

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[42]See the Moss affidavit submitted herewith.

ARGUMENT

I. Archibald Cox Was Unlawfully Discharged As Special Prosecutor.

When Elliot Richardon's confirmation hearings began eight days after his being nominated to be Attorney General, virtually the sole topic of concern to the Judiciary Committee members was the appointment of a special prosecutor for Watergate. Mr. Richardson agreed immediately that there was a need for an independent special prosecutor, and he and the Committee members discussed at great length the nature of the independence of the prosecutor. During the hearings he advised the Committee of his selection of Archibald Cox for the position, and on May 21, 1973 Mr. Cox appeared before the Committee to testify concerning his understanding of his role as the Special Watergate Prosecutor.

There can be little doubt that the confirmation of Elliot Richardson was contingent upon establishment of a truly independent prosecutor. As Senator Hart said, ". . . until we have an agreement on the ground rules establishing the independence of this special prosecutor we ought not to move to confirmation."[41] There were extended discussions about the independence of the prosecutor and the grounds for his selection and removal. Mr. Richardson stated at the start of the hearings that the Senate should "concur" in the selection

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[41] Hearings at 12.

of the special prosecutor.[42] Thus, even though technically the only confirmation was that of Mr. Richardson, it can hardly be disputed that the Senate also specifically approved the appointment of Mr. Cox as Special Prosecutor.

A considerable portion of the hearings related to the question of Mr. Cox's potential discharge should the Attorney General become displeased with his performance. Senator Ervin suggested that he would not be subject to removal "except for malfeasance in office."[43] When this matter was raised initially with the Attorney General designate, he replied that he would prefer the term "malfeasance or gross incompetence" but added that he "cannot conceive that either one would ever occur unless the man had a mental breakdown or something."[44] Later he indicated that, even if the President directed him to fire the special prosecutor, he would refuse "in the absence of some overwhelming evidence of cause," and then added that "these are things that in the present circumstances are so remotely possible as to be practically inconceivable."[45]

After receiving suggestions from the Committee members, Mr. Richardson made certain amendments to his proposed guidelines on the duties of the Special Prosecutor.[46] He stated

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[42] Id. at 5.

[43] Id. at 6.

[44] Id. at 38.

[45] Id. at 72.

[46] Id. at 144.

that, although he reserved the power of removal for "extraordinary impropriety on the part of the special prosecutor, . . . it is totally inconceivable to me that Mr. Cox would ever be guilty of extraordinary improprieties in the conduct of any function."[47] When asked by Senator Tunney to define "extraordinary improprieties," Secretary Richardson indicated that he did not think he could, adding that the phrase was one contained in a letter sent to him by Senator Stevenson and 28 others as "indicative of their notion of specific circumstances under which removal might be justified. I had another phrase before that that was incorporated in language that I had used in other hearings, about arbitrary or capricious or irrational conduct and so on, and I thought that the senatorial phrase was somewhat better, so I substituted it."[48]

With the nominee having pledged to appoint Archibald Cox as special prosecutor, having vowed to vest him with extraordinary independence, and having agreed to discharge him only for "extraordinary improprieties," the Senate accepted that solemn pledge and confirmed Elliot Richardson as Attorney General of the United States. There can be little doubt that the arrangement had the tacit if not active approval of the President, since it was he who had selected Mr. Richardson and had given him the right to decide whether or not to appoint a

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[47] Id. at 150.

[48] Id. at 177.

special prosecutor.[49] Senator Hugh Scott, the minority leader of the Senate, stated that he had discussed the matter of the special prosecutor with the President, who indicated that he would not interfere in the selection or in the conduct of the Office of the Special Prosecutor, and that the President "wishes a complete, total, absolute and utter investigation to the end, to the truth, and to the ultimate consequences."[50]

On May 31, 1973, three days after Elliot Richardson was sworn in as Attorney General, he issued order 517-73, which established the Office of Watergate Special Prosecutor. This order, which was duly published in the Federal Register of June 4, 1973, (38 Fed. Reg. 14688), and was later codified at 28 C.F.R. § 0.37 (1973), is identical to the final agreement that he reached with the Senate Judiciary Committee,[51] save for the substitution of "is" in the first sentence for the words "will be." On the same day, he formally appointed Archibald Cox to be Special Prosecutor, confirming the letter of designation he had written on May 25th. Thus, the solemn compact made by Elliot Richardson with the United States Senate was complete, and the office of an independent Watergate Special Prosecutor was established with Archibald Cox in charge.

In spite of these assurances of independence, the President directed the Attorney General of the United States to fire Mr.

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[49] Id. at 73.

[50] Id. at 46.

[51] Id. at 144-46.

Cox and to disband the Office less than five months after its creation. What Mr. Richardson had described during the hearings as actions "totally at variance with the whole approach [the President] set forth," and something that "just will not happen"[52] in fact did happen. Elliot Richardson refused to violate his agreement with the Senate and the Justice Department regulations and resigned, as did his Deputy, William D. Ruckelshaus. Then, on the evening of October 20, 1973, the Solicitor General of the United States, the defendant Robert H. Bork, became Acting Attorney General pursuant to 28 C.F.R. § 0.132(a), and at the direction of the President issued an order purporting to discharge Mr. Cox from office. The letter of discharge from the defendant to Mr. Cox[53] makes no reference to any cause, nor does it suggest that there were any "extraordinary improprieties" on the part of Mr. Cox within the meaning of the regulation establishing the office. Furthermore, at a post-resignation press conference, Mr. Richardson stated that he did not believe that Mr. Cox was guilty of any such extraordinary improprieties and that the President had not purported to fire him on that basis.[54] At his October 24th press conference the defendant never suggested that Mr. Cox had violated the regulation but stated that he

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[52] Id. at 73.

[53] Jacks Exhibit 12.

[54] Jacks Exhibit 14, p. 37.

wrote the letter because "the decision of the President to discharge Mr. Cox was final and irrevocable."[55]

There can be little doubt that Mr. Cox was fired for one and only one reason: he refused to accede to the order of the President directing him to cease further litigation with respect to documents subpoenaed from the White House. Mr. Cox had first challenged the claim of executive privilege in this Court, where he was successful in resisting the claim, and on appeal the decision below was affirmed with modifications not relevant to this proceeding. On October 19th, the President decided not to take the case to the Supreme Court, but refused to do more than provide Mr. Cox with summaries of the documents. It was in this connection that he directed Mr. Cox not to proceed with further litigation, and Mr. Cox announced at an October 20th press conference his intention not to abandon the pending litigation.[56] Immediately after that press conference, the President decided to fire Mr. Cox because of his refusal to cease litigation on the issues of executive privilege and the President's compliance with the order of the Court to produce the subpoenaed documents for an in camera inspection. No other basis for the firing has been suggested, and we do not understand either the defendant or the President to have taken a contrary position.

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[55] Jacks Exhibit 16, p. 4.

[56] Jacks Exhibit 10, pp. 16-17.

Seeking court resolution of a dispute would not ordinarily be thought to be "extraordinary improprieties," even where the dispute relates to executive privilege. More important, however, both the testimony before the Judiciary Committee and the terms of the enabling regulation make it clear that Mr. Cox's refusal to cease litigation of the issues was not an extraordinary impropriety. The regulation specifically gives to the Special Prosecutor the "full authority * * * for * * * determining whether or not to contest the assertion of 'Executive privilege' or any testimonial privilege * * * *"[57] This specific authority was discussed and approved by the Senate Committee in various parts of the hearings,[58] and thus there can be no doubt that the applicable regulation, which permits a discharge only for extraordinary improprieties, cannot be read to apply to an assertion of a power which was specifically granted to the Special Prosecutor. Finally, when the defendant was asked at his press conference whether Mr. Cox was guilty of extraordinary improprieties, he stated that he had "very little knowledge of Mr. Cox's activities" and that he believed Mr. Richardson who told him that Mr. Cox "was guilty of no extraordinary improprieties."[59]

The regulation governing the discharge of the Special Prosecutor was legally in full force and effect when the attempted firing took place, and hence it limits the authority

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[57] 28 C.F.R. § 0.37 (1973).

[58] Hearings at 41-42, 52, 57-58, 68-69, 77.

[59] Jacks Exhibit 16, pp. 27-28.

of the Attorney General to discharge Mr. Cox except for "extraordinary improprieties" until it is validly amended or repealed. The principles of administrative law firmly establish that an agency which issues regulations is bound by them and cannot act in disregard of them. Vitarelli v. Seaton, 359 U.S. 535 (1959), and Service v. Dulles, 354 U.S. 363 (1957). Even though Mr. Cox might have been summarily dismissed in the absence of the regulation, its existence limits the authority of the defendant to discharge Mr. Cox except for "extraordinary improprieties." See Vitarelli, supra, 359 U.S. at 540.

Under these basic principles of administrative law, it is plain that the firing of Archibald Cox was unlawful. This result is particularly appropriate here since there can be little doubt that Elliot Richardson would not have been confirmed by the Senate without specific assurances that Mr. Cox would be truly independent and not subject to normal rules regarding dismissal, and that he would be given full authority over the Watergate investigation. Moreover, it is equally clear that Mr. Cox assumed the job only after assuring himself that he would be independent and could be discharged only in accordance with the guidelines,[60] which Mr. Richardson stated would be issued as regulations having the full force of law.[61]

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[60] Hearings at 144, 174.

[61] Id. at 200-201.

Since his discharge was not for the only valid reason under the regulation, it was unlawful and must be set aside.[62]

It may be argued that the same result could have been obtained by revoking the regulation first and then firing Mr. Cox. The answer to this, of course, is that this is not what was done. The defendant issued an Order on October 23rd, purporting to make it effective as of October 21st, abolishing the Office of the Special Prosecutor. Since Mr. Cox was fired the day before the purported effective date of the order, that order cannot arguably validate the discharge. Moreover, as we shall demonstrate in Point II of this Memorandum, even the belated attempt to revoke the regulation and abolish the Office was invalid.

Archibald Cox was fired in clear violation of a valid existing regulation which permitted his discharge only for "extraordinary improprieties." It is apparent that no such improprieties existed and that the cause of his firing was his refusal to desist from doing that which he was specifically authorized to do under that regulation. Seen in this light, plaintiffs have established not merely that there is a strong probability that Mr. Cox was unlawfully fired, but a virtual certainly of that.

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[62] In addition, the discharge was invalid for the reasons set forth in Sections B and C of Point II of the Argument--i.e., that as Acting Attorney General the defendant lacked the power to discharge Mr. Cox and that his decision to do so was not an independent exercise of his discretion but was merely a carrying out of the President's order in order to prevent the President from discharging him as well.

II. The Attempted Abolition Of The Office Of The Special Prosecutor Was Invalid.

A. The Regulation Precludes Abolition of the Office.

In order to achieve the objectives of the President, the defendant issued an order on October 23rd which purports to abolish the Office of Special Prosecutor. Plaintiffs contend that the order is without validity for a variety of reasons, the first of which is that the regulation creating the office provides for the "Duration of assignment" of the Special Prosecutor as follows:

> The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.[63]

The clear import of this provision is that the Office of Special Prosecutor shall remain in existence until the Special Prosecutor determines that his work is done, or until he and the Attorney General agree upon a termination date. There can be no dispute that neither of those conditions has been met, and accordingly, under the terms of the regulation itself, the office may not be abolished.

The only defense to the plain meaning of this provision, which mandates the continuation of the Special Prosecutor's Office until either of two events occurs, is that there was no authority to enact such a provision and that it could have

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[63] 28 C.F.R. § 0.37 (1973).

been revoked the day after its adoption.[64] Our research has disclosed no case in which a revocation of a regulation containing a provision similar to this has been challenged in court. We believe that an analogous area of the law--that dealing with the validity of statutes establishing fixed terms for Presidential appointees--may be of assistance to the Court in this case. Thus, cases such as Humphrey's Executor v. United States, 295 U.S. 602 (1935), and Wiener v. United States, 357 U.S. 349 (1958), suggest an analysis that is relevant in determining the validity of the provision establishing a determinable, non-revocable term for the Office of the Special Prosecutor. Those cases hold that the validity of statutory limitations on the President's removal powers turns upon the question of whether the office was purely executive, or whether it was one which contained functions which are in part either legislative or judicial. Humphrey's Executor, supra, 295 U.S. at 628-629. In addition, the necessity for the independence of the particular officer was considered to be highly significant. Id. at 629-30. Judged by these standards, it is apparent that the Office of Special Prosecutor was not purely executive, as was the Postmaster Firstclass in Myers v. United States,

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[64] In this connection it should be noted that Justice Department regulations, 28 C.F.R. §§ 0.25(b) and 0.182, require the Assistant Attorney General in Charge of the Office of Legal Counsel to review all proposed orders, including those affecting organizational changes in the Department, for form, legality, and consistency with other orders. It would be interesting to know what led the same person, Robert G. Dixon, to conclude in May that the provision was valid, and to reach the opposite result in October.

272 U.S. 52 (1926) in which the Court held the limitation on discharge to be unconstitutional.[65] The relation of the Special Prosecutor to the Grand Jury and the fact that the Special Prosecutor had been created in a compact with the Congress in part to investigate the executive branch demonstrate that the office is not purely executive. It is obvious that no person could investigate the President and his closest associates and be a purely executive officer. Therefore, the situation is similar to that in Humphrey's Executor (Federal Trade Commissioner) and Wiener (War Claims Commissioner) where the discharge limitations were upheld.

There are further very strong justifications for the independence of the Special Prosecutor here which support the necessity for insuring that the Office cannot be abolished. Certain of the members of the Justice Department may be witnesses to charges of obstruction of justice (such as Assistant Attorney General Henry Petersen who is now in charge of the investigation), and other former Justice Department officials may themselves be prosecuted. In both of these cases, it is obvious that the Special Prosecutor's Office must be independent of those persons and that, if it is part of the Department of

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[65] The Court held that there could be no limitation on the President's power to dismiss where Congress had vested the power of appointment in the President. It noted that until Congress "is willing to vest their appointment in the head of the department, they will be subject to removal by the President alone and any legislation to the contrary must fall as in conflict with the Constitution." 272 U.S. at 163. Thus, Myers is not applicable to the issue of discharge since Mr. Cox was not appointed by the President.

Justice, that independence will be destroyed. Furthermore, although Mr. Petersen had assured the public in September 1972, that an exhaustive investigation of the Watergate matters had taken place,[66] it is obvious that the Senate wanted a fresh look taken at the situation and felt that the Justice Department could not properly provide it. This was a situation in which it was essential that public confidence be restored by a truly independent prosecutor who, among other things, could assure sources, who might be unwilling to cooperate with the Justice Department proper, to come forth with evidence. Finally, and perhaps most important of all, Mr. Cox and the staff, which he was free to hire himself, would not have served unless the necessary assurances had been given that he would truly be independent.[67] It is apparent that "independence today but abolition tomorrow" is not the kind of independence that the Senate approved when it confirmed Elliot Richardson. The continued vitality and existence of the Special Prosecutor's office was part and parcel of the confirmation proceedings since the identical terms regarding continuation of the Office that were in the guidelines submitted by Mr. Richardson to the Senate are in the regulation. Everyone, from the President down, knew precisely the nature of the bargain that had been struck with the Senate. To confirm Elliot Richardson as

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[66] Hearings at 152.

[67] Id. at 144-46.

Attorney General, it was necessary to agree to the establishment of an independent Special Prosecutor's office, and in exchange the Senate put aside the various other legislative solutions which had been proposed to it.[68] It is inconceivable that the Senate would have confirmed Elliot Richardson if the position of the President and the Justice Department were that the assurances of the continued operation of the Special Prosecutor's office were no more than empty promises which could be broken as soon as either Elliot Richardson changed his mind, resigned, or was fired. Yet, that is precisely the position which the defendant must take in this proceeding if he is to persuade this Court that the abolition of the office was lawful under the circumstances of this case. We submit that the attempted abolition of the Office of Special Prosecutor by Order 546-73 was a nullity and that there was no authority even for a duly confirmed Attorney General to abolish the Office at this time.[69]

B. The Defendant, Who Is Acting As Attorney General Pursuant To 28 U.S.C. § 508(b), Lacks The Power To Abolish The Office Of Special Prosecutor.

The attempted destruction by the defendant of the Office of the Special Prosecutor is also invalid because defendant is

[68] Id. at 62. See also note 4, supra.

[69] The legislative understanding was further confirmed when the Senate appropriated 2.8 million dollars for the Office of the Special Prosecutor. S. Rep. No. 368, 93rd Cong., 1st Sess. 12 (1973); See also Hearings Before the Committee on Appropriations, 93d Cong., 1st Sess., pt.2, at 2151-2153, 2181-2194 (1973). Because the Office was created after the House committee had concluded deliberations on the Justice Department fiscal 1974 appropriations, no provision was included in the House bill, and as of this date, no conference committee meeting has been held to resolve the differences between the two bills.

merely an Acting Attorney General. The Office was established by Elliot Richardson, whose confirmation depended upon his agreement to set up such an Office, and thus it is inconceivable that the Senate expected that the Office could be abolished by someone who became Acting Attorney General pursuant to 28 U.S.C. § 508(b). To permit the defendant to abolish the Office would mean it could also have been eliminated by any of the nine Assistant Attorneys General covered by Section 508(b), including one whose appointment does not even require confirmation. See 28 U.S.C. § 507. That cannot have been the intent of those who voted for the confirmation of Elliot Richardson.

The proposition that the defendant, who is a confirmed Solicitor General but merely an Acting Attorney General, has no authority to effect major organizational changes such as this in the Department of Justice, is supported by the Department's own regulations. Chapter 28 of the Code of Federal Regulations, section 0.180 provides in pertinent part that

> All documents relating to the organization of the Department or to the assignment, transfer, or delegation of authority, functions, or duties by the Attorney General or to general departmental policy shall be designed as orders and shall be issued only by the Attorney General in a separate, numbered series. (emphasis added).

Our research discloses that this is the only instance in the Justice Department's published regulations in which a function is authorized to be performed "only" by the Attorney General. In fact, in only two other instances in the Justice Department regulations is the term "only" used to explicitly limit the authority granted to the persons described. In both of these

instances (28 C.F.R. §§ 3.6 and 17.23) persons other than the Attorney General are also authorized to take the particular actions. In the case of § 17.23, which provides that only the Attorney General and such other officials as he has designated in writing may classify documents Top Secret, the use of "only" is clearly for emphasis since the very next section, which deals with Secret and Confidential classifying authority, fails to use that term. Thus, the use of "only" in § 0.180 cannot be lightly disregarded, and since defendant was not the Attorney General, he had no authority to issue order 546-73 which so significantly affects the organization of the Justice Department.[70]

Chapter 31 of Title 28 (Sections 501-526), which contains the Congressional mandate covering the Department of Justice and the Attorney General, provides statutory support for the proposition that the defendant may not effect wholesale changes in the organization of the Department of Justice. Section 508(a) provides that, in the case of a vacancy in the office of the Attorney General, the Deputy Attorney General "may exercise

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[70] The importance attached to organizational changes is demonstrated by the Reorganization Act of 1949, 5 U.S.C. §§ 901 et seq., under which a reorganization plan must be submitted by the President to Congress for 60 days before it can become effective. Such plans include "the consolidation or coordination of a part of an agency or the functions thereof with another part of the same agency or the functions thereof. . . ." 5 U.S.C. § 903(a)(4), and thus appear literally to cover the transfer at issue here. However, the Act has never been considered to apply to functions which are created administratively, and hence its requirements are useful only as a guideline that Congress attached to major organizational alterations.

all of the duties of that office . . . ." The immediately following subsection [508(b)], which deals with the instant case in which neither the Attorney General nor the Deputy is available, provides in startlingly different language that the next person in succession, who may be either the Solicitor General or an Assistant Attorney General as designated in departmental regulations, "shall act as Attorney General."[71] If Congress had intended that someone acting under Section 508(b) would have the same powers as a Deputy Attorney General acting under Section 508(a), it would surely have used the same and not different language. The failure to use identical language in two parts of the same section strongly suggests that Congress did not intend the authorities granted by those provisions to be identical.

Moreover, the legislative history of Section 508 demonstrates that this difference in language is not a mere happenstance of draftsmanship but is based on significant differences between the duties and qualifications of the Deputy on the one hand, and the Assistant Attorneys General and the Solicitor General on the other, and thus operates to withhold from defendant the authority to order such drastic changes as the abolition of the Office of Special Prosecutor. Under Section 347 of the Revised Statutes of 1874, the Solicitor General was the person who filled any vacancy in the office of the Attorney

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[71] Prior to October 23rd, the only successor designated was the Solicitor General. 28 C.F.R. § 0.132(a). On that date defendant issued a new order providing for further successors after the Solicitor General. See 38 Fed. Reg. 29466 (Oct. 25, 1973).

General and was given the power "to exercise all of the duties of that office," which is the same language used now in Section 508(a) regarding the Deputy. Following the passage of the Reorganization Act of 1949, Reorganization Plan No. 4 of 1953 was submitted by President Eisenhower to the Congress on April 20, 1953.[72] Section 1(a) of that Plan provided that "[t]he function with respect to exercising the duties of the Office of Attorney General vested in the Solicitor General by section 347, Revised Statutes, as amended (5 U.S.C. 293),[73] is hereby transferred to the Deputy Attorney General, and for the purposes of Section 177, Revised Statutes (5 U.S.C. 4)[74] the Deputy Attorney General shall be deemed to be the first assistant of the Department of Justice." Thus, Section 1(a) substituted the Deputy Attorney General for the Solicitor General as the immediate successor to the Attorney General, and this provision became the basis of Section 508(a) of the current Title 28. Section 1(b) of that Reorganization Plan established a new provision which is substantially identical to the present Section 508(b) and which provided for the filling of the vacancy of the office of Attorney General when neither the Attorney General or the Deputy is available, by the Solicitor General or the Assistant Attorneys General in such order of succession as the Attorney General may from time

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[72] Jacks Exhibit 18.

[73] Now 28 U.S.C. § 505.

[74] Now 5 U.S.C. § 3345.

to time prescribe. Section 1(b) specifically provided that the person filling the vacancy in that case "shall act as Attorney General," a marked contrast to the language used to describe what the Solicitor General formerly might do under Section 347 of the Revised Statutes, and what the Deputy could do once the change took place, as it did on June 20, 1953, without objection by Congress.[75]

The accompanying reorganization message sent by President Eisenhower gives the reasons for this change.[76] He stated that the Solicitor General is

> no longer the appropriate officer of the Department of Justice to be the first in the line of succession of officers to be Acting Attorney General. His basic and primary function is to represent the United States before the Supreme Court. He is not concerned with the day-to-day administrative direction of the affairs of the Department of Justice. Thus, he is not likely to be the officer of the Department whose regular duties best prepare him to assume the occasional responsibility of guiding the affairs of the entire Department in the capacity of Acting Attorney General.

The message then detailed the duties of the Deputy Attorney General, from which President Eisenhower concluded that the Deputy is "both by title and by the nature of his functions, the officer best situated to act as the administrative head of the Department of Justice when the Attorney General is absent or disabled or the office of Attorney General is vacant."

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[75] 67 Stat. 636 (1953). In 1966 the codification of Title 28 merely reflected these changes in what are now Sections 505 and 508.

[76] A copy of President Eisenhower's message is submitted as Jacks Exhibit 18.

The differences in language between these two provisions, now Sections 508(a) and 508(b), and hence the differences between the authority given the Deputy and that given the others when filling a vacancy in the position of Attorney General, are amply supported by the reasons given by the President for removing the Solicitor General from the position as immediate successor to the Attorney General and these reasons still apply today. The duties of the Solicitor General, as set forth in 28 C.F.R. § 0.20, indicate that he is basically an appellate attorney, one not concerned with overall departmental administration and one who, in the language of Section 505 of Title 28, is selected because he is "learned in the law." Similarly, the Assistant Attorneys General all are given areas of special expertise, ranging from tax, to criminal law, to antitrust. While those persons may be well-qualified in their areas of expertise, there is no guarantee that they have any broader range of experience such as would be normally found in an Attorney General or his Deputy. Moreover, they were not confirmed for their positions with these broader duties in mind and have ordinarily had virtually no experience in the Department outside their specialized area. Accordingly, they would, in the normal course of events, be ill-suited to handle the wide-ranging duties of the Attorney General, whereas the Deputy by reason of his normal functions would be prepared to take over for the Attorney General, and his confirmation would have been given with this in mind. It is one thing for Congress to provide a statutory framework to insure that there is always someone to act as the head of the Justice Department;

it is another to assume that when Congress used different language to describe what different officials may do when filling a vacancy in the office of Attorney General, that it meant that in both instances the powers were identical.

The notion that an Acting Attorney General has limited powers and cannot perform all of the duties that the Attorney General may, is fully consistent with the Constitution and, indeed, may even be required by it. Article 2, section 2, clause 2 provides that the President . . .

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, or in the Courts of Law, or in the Heads of Departments.

There can be little doubt that the requirement of Senate confirmation is essential in order for Congress to maintain some measure of control over those department heads who are in charge of effectuating the laws which have been duly enacted by Congress. It is apparent that, if a person not confirmed by the Senate as a department head could assume the duties of a department head, great changes could be wrought without any opportunity for Senatorial supervision and control. On the other hand, it is equally apparent that some interim measures must be provided for so that when a sudden vacancy occurs in an important governmental office, the immediately necessary work of that office does not cease because there is no person

validly holding the office as head of the department.[77]

Therefore, the Second Congress enacted a statute in 1792 which provided for the temporary filling of vacancies in the offices of Secretary of State, Treasury, and War by the President.[78] It was not until 1863 that Congress extended to the President the power of temporarily filling a vacancy in the other heads of departments and simultaneously imposed the first time limitation on vacancy appointments (six months).[79] In 1868, because of alleged abuses by President Andrew Johnson, the period for filling a vacancy was cut to 10 days by the statute which is known as the Vacancies Act and is now codified in 5 U.S.C. §§ 3345-49.[80] Senator Trumbull, the statute's principal Senate sponsor, stated that it was his intention that the bill should repeal all other laws inconsistent with it and that

> the intention of the bill was to limit the time within which the President might supply a vacancy temporarily in the case of the death or resignation of the head of any of the departments or of any office appointed by him with the advice and consent of the Senate in any of the departments * * * *
> 39 Cong. Globe 1163 (Feb. 14, 1868).

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[77] The defendant's action in promulgating an order of succession to follow him (38 Fed. Reg. 29466, October 25, 1973) was clearly the type of emergency action which he had authority to take since the prior regulations, 28 C.F.R. § 0.132(a), did not cover the case in which there is no Solicitor General to fill the vacancy.

[78] 1 Stat. 281, Ch. 37, Sec. 8.

[79] 14 Stat. 656, Ch. 44.

[80] 15 Stat. 168, Ch. 227.

The ten day limit for filling temporary vacancies was increased in 1891 to the present 30-day period[81] because of a belief that the shorter time limit resulted in undue haste and possible mistakes in selecting persons for important positions. See 22 Cong. Rec. 2078-79, (Feb. 3, 1891) (Remarks of Senator Gorman and others). Accordingly, since the office of Attorney General is covered by the Vacancies Act, see 28 U.S.C. § 508(a) and 5 U.S.C. §§ 101 and 3345-49, the defendant may continue as the interim head of the Justice Department only for a period of 30 days. See Williams v. Phillips, 360 F. Supp. 1363 (D. D.C.), motion for stay denied, 482 F. 2d 669 (D.C. Cir. 1973).[82]

Thus, the Congressional decision to permit the President to fill vacancies in emergency situations, where the Constitution otherwise requires that he first obtain the advise and consent of the Senate, coupled with the short periods of time for which those vacancies may be filled, strongly suggests a Congressional concern that these interim appointments be only for the purpose for which they are intended--i.e., to handle

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[81] 26 Stat. 733, Ch. 113.

[82] We do not suggest that the actual confirmation process and swearing in must be completed within 30 days, which expires in this case on November 19th, since that would permit the Senate, by delaying action on a nominee, to cause the removal from office of the person holding the acting position. In our view the Vacancies Act is properly construed to require only the nomination of a new Attorney General within that period of time. This view is supported by the remarks of Senator Trumbull, who said: ". . . the President is authorized to detail some other officer to perform the duties for ten days in case of a vacancy, and during those ten days it will be his duty to nominate to the Senate * * * some person for the office * * *." 39 Cong. Globe 1164 (Feb. 14, 1868).

emergency or quasi-emergency situations. Congress never intended the Vacancies Act to be a blanket authorization to the President to affect wholesale changes in the operation of the departments during periods in which the head of a department is an interim appointee who has not been confirmed by the Senate.

Seen in this light, the distinction between the language in Sections 508(a) and 508(b) is quite significant and represents a judgment initially made by President Eisenhower and confirmed by the Congress that the emergency powers which may be conferred upon a Deputy Attorney General are of one kind, whereas those conferred upon the Solicitor General and the other specialists who head the divisions of the Justice Department, are of a different sort. Congress was obviously aware that the vacancies would only be for a period of 30 days and that the nature of the matters to be undertaken during that time could not be fully predicted. Yet these statutes clearly indicate an expression of Congressional policy that the Solicitor General and the other Assistant Attorneys General do no more than is necessary, whereas far greater power is given to a Deputy Attorney General who is filling the Office of the Attorney General. Judged in light of the historical perspective, it is apparent that Congress, in passing the Vacancies Act and in enacting Section 508(b), never intended to allow a Solicitor General, as an Acting Attorney General, to take so drastic an action as the abolition of the Office of the Special Watergate Prosecutor, which had

been painstakingly created in conjunction with the Senate and which had been the quid pro quo for the confirmation of Elliot Richardson and the abandonment of proposals to create an independent special prosecutor by Act of Congress.

Finally, the defendant has himself expressed the view that as an Acting Attorney General his proper role is a limited one:

> . . . I am not nominated and confirmed Attorney General, and therefore, I view it as my task simply to keep the Department going on an even keel and to make it as effective as possible for as long as we can until a new Attorney General is nominated and confirmed. I don't plan any major structural changes. I don't plan any personnel changes.[83]

This common sense view, that an Acting Attorney General is little more than a caretaker, is buttressed by Section 508(b) when the Acting Attorney General is someone other than the Deputy. Yet the major organizational change which defendant ordered is wholly at odds with his own concept of a limited role for an Acting Attorney General. Accordingly, for the reasons set forth above, defendant lacked the power to issue order 546-73 abolishing the Special Prosecutor's Office.

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[83] Jacks Exhibit 16, at 5.

C. Defendant's Order Assigning the Functions of the Office Of Special Prosecutor Back To The Criminal Division Was Not An "Appropriate" Order Within 28 U.S.C. § 510, And Was Arbitrary, Capricious, And Without Basis In Law Or Fact.

The attempted abolition of the Office of the Special Prosecutor by defendant was also invalid because it was not an "appropriate" order under 28 U.S.C. § 510. The analysis of this issue begins with Section 509, which provides that "all functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General . . ." with four exceptions not relevant here. Next, under Section 516 the conduct of litigation to which the United States is a party, which includes all criminal proceedings, is reserved to officers of the Department of Justice under the direction of the Attorney General.

Thus, under this statutory framework, the President has the undisputed authority to nominate, and with the advice and consent of the Senate, to appoint the Attorney General of the United States, but he does not have the power to run the Justice Department, or to require the Attorney General to perform specific acts, or to direct the Attorney General's subordinates to do any such acts. This is made clear from provisions such as Section 511, under which the Attorney General "shall give his advice and opinion on questions of law when required by the President," a power specifically derived from Article 2, Section 2, Clause 1 of the Constitution.[84] That same clause in the

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[84] "The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices . . . ."

Constitution also makes the President Commander-in-Chief of the Armed Forces, an authority which permits him to direct their operations. But there are no comparable statutory or constitutional authorizations for him to direct the Department of Justice, and hence if he disagrees with the policies which the Attorney General is following, his only recourse is to discharge him. The President does not have the authority to direct the implementation of those policies, and indeed he has no authority to order the discharge of inferior officers or the reorganization of the Department of Justice. The actions of the President in this case confirm this interpretation since he did not attempt to discharge Archibald Cox himself, nor did he issue any orders which purported to abolish the Office of the Special Prosecutor. These tasks he assigned to others, and when two Attorneys General resigned rather than comply, the defendant was asked and agreed to carry out the directives.

The Supreme Court has recognized that the provision in Article 2, Section 1 of the Constitution that "the executive power shall be vested in a President of the United States" does not mean that the President may direct the actions of every single person in the executive branch of the government contrary to express Congressional direction:

> The executive power is vested in a President, and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.

> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.
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> It was urged at the bar that the Postmaster General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution; and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyse the administration of justice. Kendall v. United States, 37 U.S. [12 PET.] 524, 610, 612-13 (1838).

Accordingly, it is the determination of the defendant who ordered the abolition of the Office, and not that of the President which must be judged in assessing the lawfulness of the attempt to bring the Office of Special Prosecutor back into the Criminal Division of the Justice Department.

In assessing the validity of the defendant's direction, it is well to recall the sequence that led to the attempted abolition. On the afternoon of October 20th, after both the Attorney General and the Deputy Attorney General declined to discharge Mr. Cox and

to abolish the Office of Special Prosecutor, the President made a similar request of the defendant, and he agreed to execute the orders. That very evening, minutes after the discharge orders were conveyed to Mr. Cox, agents of the Federal Bureau of Investigation were sent by the White House to take control of the files at the Office of the Special Prosecutor and thereby to deny access to members of that staff to the premises. Thus, the legality of the determination to reassert control over the Watergate investigation must be judged on the basis of what the defendant knew and considered on Saturday, October 20th, and not at the time that the decision was committed to writing three days later.

The authority under which the Attorney General may assign the functions of the Justice Department among its employees is contained in Section 510, which provides that the Attorney General may "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." Thus, the statute requires that the Attorney General consider the assignment to be "appropriate," and it is apparent here that the defendant gave no independent consideration to the question, but simply obeyed the order of the President. Mere obedience to the command of another cannot constitute a proper use of administrative discretion.[85]

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[85]The Department's own regulation, 28 C.F.R. § 0.182, requires the submission of proposed orders to the Office of Legal Counsel "for approval as to form and legality and consistency with existing orders." There is not the slightest indication that any such action was taken before the F.B.I. take-over of the files of the Special Prosecutor, and thus there also appears to be a failure of compliance with the Department's own regulations.

There are only two reasons of which we are aware for which the office might have been abolished. If either or both of these reasons is improper, i.e., legally irrelevant to defendant's determination that abolishing the office was "appropriate," then the determination must be set aside. D.C. Federation of Civic Ass'ns. v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972). The first possible reason is that the President did not want to surrender more than the summaries of the tapes, which he had agreed to provide to Judge Sirica, and which Mr. Cox, and presumably other members of the Office of the Special Prosecutor, would not accept as being sufficient. That reason is not necessarily related to the independence of the Office since any prosecutor could demand the tapes, subject only to the threat of discharge by the Attorney General for doing so. Thus, that reason seems wholly irrelevant to any consideration that might properly cause defendant to abolish the Office of the Watergate Special Prosecutor.

The second possible reason is that the President himself was concerned that the investigation was coming too close to him, to former members of his Cabinet, to his friends, and to his former close associates in the White House. In short, he was concerned that the independent prosecutor would truly be independent, and that he and his closest associates might be adversely affected by such continued independence. No other reason has been suggested for the abolition of this office, and the circumstances admit of no other conclusion. It is apparent that if this other reason is the basis for assigning the functions of the Special Prosecutor back to the Criminal Division, that is not an "appropriate" reason under Section 510.

Finally, in determining whether the defendant acted in an arbitrary and capricious manner in abolishing the Office, it is well to consider that he was aware of the resignation of the two predecessors in office and knew that he would be out of a job unless he also agreed to the President's desire.[86] Seen in this light, his decision, even if he had the authority and met the technical requirements of the statutes and regulations, was clearly affected by a personal stake and thus must be judged with the greatest skepticism. In that respect the defendant's decision must be viewed in the same manner as the Court of Appeals for this Circuit did in assessing the approval by the Secretary of Transportation for the Three Sisters Bridge in D.C. Federation of Civic Ass'ns. v. Volpe, supra. The improper influence in that case was a threat on the part of Representative Natcher to withhold badly-needed funds for the District of Columbia Metropolitan Transit Authority unless the bridge was approved by Secretary Volpe. Judge Bazelon found this pressure to be "sufficient, standing alone, to invalidate the Secretary's action,"[87] and Judge Fahy agreed that it was sufficient, when combined with other factors, to overturn the administrative decision. We submit that the virtual certainty of the defendant that he would be fired unless he obeyed the President's order, coupled with the fact that the President appears to have acted in part to prevent the Special Prosecutor from investigating him and his closest associates, fatally taints defendant's decision to abolish the Special Prosecutor's Office and requires that

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[86] Jacks Exhibit 16, p. 3.

[87] 459 F.2d at 1245.

this Court set aside Order 546-73 of October 23, 1973.

* * *

The question presented on the abolition of the Office of the Special Prosecutor is whether the statutes, regulations, Constitution, and the Congress of the United States contemplate that a Solicitor General, who is suddenly catapulted into the office of Acting Attorney General, should be able to make the drastic organizational change of destroying the Office of an independent prosecutor, which was established to reassure public confidence in the investigation of the Watergate matters, where he did so at the direction of the President who is a subject of the investigation and where he made the decision in order to avoid being fired and without any rational basis. Plaintiffs submit that the answer to this question is clearly "No," and that the attempted abolition of the Office of Special Prosecutor was of no force and effect.

III. Immediate Injunctive Relief Is Required In This Case.

The Court of Appeals for this Circuit established the criteria for the issuance of a preliminary injunction in Virginia Petroleum Jobbers Ass'n. v. FPC, 131 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958). Under that decision, this Court is required to consider the probability of success on the merits, to balance the equities between the parties, and to assess where the public interest lies. Moreover, the Court made it clear that a far lesser showing of irreparable harm to the plaintiffs is required as the probability of success increases. Id. As we have demonstrated above, there is a very strong likelihood that

Mr. Cox was unlawfully discharged from his office and that the attempted abolition of the Office of Special Prosecutor was invalid. Thus, the showing of harm to these plaintiffs which is required can be met without proof of the kind of irreparable harm present in other situations where plaintiff's case on the merits is not so strong.

Each of the plaintiffs is seeking to restore the public confidence in the administration of justice in this country and to insure that a truly independent special prosecutor is given full powers to investigate the full range of Watergate matters. Their efforts will be greatly aided by a preliminary injunction since that will permit them to turn their attentions away from legislative solutions to the problem of an independent prosecutor and direct their efforts towards other aspects of the problem, particularly since preliminary relief will entail a finding of probable success on the merits.[88]

A preliminary injunction will cause almost no harm or inconvenience to the defendant since he has little personal stake in the outcome of this controversy· in fact, an injunction may relieve him of the problem of selecting a new prosecutor to handle the Watergate matters and of the need to exercise any further supervision over this matter. As for the public interest, even a preliminary injunction will go a long way towards restoring the public's faith that ours is still a system of laws and not men and that the actions of every citizen are subject to scrutiny by the courts where they transgress specific provisions of law.

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[88]Had the attempted discharge not already taken place by the sudden unilateral action of defendant, there seems little doubt that the balance of equities would compel the issuance of an injunction, even if the case were far weaker on the merits.

This motion also asks that the hearing on the motion for a preliminary injunction be consolidated with a hearing on the merits as authorized by Rule 65(a)(2). This case would seem to be a particularly appropriate one for consolidation since the facts would not appear to be in dispute and the conflicts are solely those of law. Perhaps more important than the absence of factual dispute, and the consequent lack of need for discovery, is the real public need for the resolution of this conflict at the earliest time. So long as there is any uncertainty about the legality of the firing of Mr. Cox, the work of the Office cannot go forward. No defendant will be able to consider entering a plea until he knows who is in charge of the prosecution, and no indictments can be brought until it is determined who has the final authority to decide who is to be charged with what. Perhaps the best evidence of the uncertainty that must be resolved is the joint motion of the Special Prosecutor's Office and Mr. Petersen which asked Judge Sirica to take control over the Office's files until these questions of control can be resolved.[89]

Finally, the stated intention of the President to have the defendant appoint during this week a new special prosecutor, who will operate within the Justice Department, makes clarification of the legality of defendant's actions at the earliest time even more urgent. It is clearly not in the interest of anyone to have a new prosecutor embark on examination of all the work undertaken by the Special Prosecutor's Office only to be told later that Archibald Cox is still validly holding the position of Special Prosecutor.

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[89]See Jacks Exhibit 17.

CONCLUSION

For the reasons set forth above, plaintiffs' motion should be granted in all respects, and this Court should enter plaintiffs' proposed order submitted herewith.

DATED: Washington, D.C.
October 29, 1973

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER, Plaintiff, v. ROBERT H. BORK, Acting Attorney General of the United States, Defendant.	)	Civil Action 1954-73

ORDER

Plaintiff having moved under Rule 65(a) of the Federal Rules of Civil Procedure for a preliminary injunction and for an order directing that the trial of the action on the merits be advanced and consolidated with the hearing of this motion and defendant having been heard with respect thereto, it is hereby ORDERED and ADJUDGED as follows:

(1) The trial of this action on the merits has been advanced and consolidated with the hearing on this motion;

(2) Defendant's purported dismissal of Archibald Cox as Special Prosecutor was unlawful and of no force or effect, and Archibald Cox still validly holds that office;

(3) Defendant's purported abolition of the Office of Watergate Special Prosecution Force was unlawful and of no force or effect; and,

(4) Defendant is hereby permanently enjoined from:

(a) Taking any action which in any way interferes with the functioning of Mr. Cox as Special Prosecutor and as Director of the Watergate Special Prosecution Force; and

(b) Appointing a new Special Prosecutor to direct the investigation or prosecution of matters falling within the jurisdiction of the Special Prosecutor

under 28 C.F.R. § 0.37; and

(c) Permitting Henry E. Petersen to remain in charge of the investigation or prosecution of said matters; and

(d) Conducting the investigation or prosecution of said matters within the Criminal Division of the Department of Justice; and

(e) Carrying out or enforcing the provisions of Order No. 546-73 which purports to abolish the Office of Watergate Special Prosecution Force; and

(f) Taking any action which in any way interferes with the operation of the Office of Watergate Special Prosecution Force as set forth in 28 C.F.R. § 0.37 (1973).

DATED:

United States District Judge

STATEMENT OF THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.

ON THE NOMINATION OF ROBERT H. BORK

TO THE SUPREME COURT OF THE UNITED STATES

Linda Flores, President
Puerto Rican Legal Defense
& Education Fund, Inc.
October 2, 1987

STATEMENT OF THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND
ON THE NOMINATION OF ROBERT H. BORK
TO THE SUPREME COURT OF THE UNITED STATES

The Puerto Rican Legal Defense and Education Fund is the national legal arm for the approximately 2.7 million citizens of the United States who according to every available socio-economic indicator are in crisis. Our population has the lowest media income and the highest unemployment rate; lowest educational advancement and the highest dropout rate; and is nearly always facing high risks of health dangers. Our community is also plagued by racial abuse and denied access to governmental services and benefits. As a civil rights organization, the Puerto Rican Legal Defense and Education Fund has successfully challenged the pervasive discrimination Puerto Ricans confront in the areas of education, voting, employment, housing and health.

It is because of these conditions and the unique political and citizenship status of Puerto Ricans in this country that the Puerto Rican Legal Defense and Education Fund has consistently fought to protect our right to vote on an equal basis with all other citzens. And it is because voting is so fundamental a right in this democracy that Puerto Ricans must oppose President Reagan's nomination of Robert Bork.

The Supreme Court stated in Westbury v. Sanders[1] that no right is "more precious" than the right to vote in a free country. As this country strives to revitalize its democracy, we are aware that our citizenry is turning out to vote in numbers far lower than expected, with only 38% of the adult population voting in 1986.[2] Despite notable achievements in the registration of Latino and Black voters, the sad fact is that voting in this country is highest if you are among the wealthiest of citizens and lowest if you are among the poorest of citizens.[3]

Puerto Ricans represent a class of voters whose participation is exemplary on the island of Puerto Rico[4] but only marginal here in the United States. Our access to the polls is dependent on equal access in both the English and Spanish languages. The Puerto Rican Legal Defense and Education Fund has a long history of litigation against the discrimination Puerto Ricans face with all English voting procedures.[5]

Congress clearly recognized this in Section 4(e) of the Voting Rights Act of 1965 by outlawing the use of an English literacy test to ban Puerto Ricans from registering who have attained a sixth grade education in their native land.[6] In Katzenbach v. Morgan[7] the Supreme Court upheld the constitutionality of Section 4(e) as a valid exercise of its enforcement powers under the Fourteenth Amendment. The Court reiterated Congress' aim to enact

> ...A measure to secure for the Puerto Rican community residing in New York non-discriminatory treatment by government - both in the impositions of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.[8]

As this Committee is well aware, Judge Robert Bork's outlook on voting rights is retrogressive. In his view only States can outline the contours of this fundamental right and he would thus return this country to the days before the passage of the Voting Rights Act. Specifically, Robert Bork in 1982 described the Supreme Court's ruling in Katzenbach v. Morgan as a "bad" and even "pernicious" ruling.[9] Congress, therefore, has no power to enforce the guarantees of the Fifth Amendment under Bork's America for, despite legislative history to the contrary[10], States' rights are supreme in the area of the franchise.[11]

The Puerto Rican community in the United States is alarmed by the prospect of Judge Bork's appointment to the Supreme Court. His steadfast position on Congress' enforcement powers is only one of the numerous adverse positions he has taken in the area of voting rights. In 1979, the man who has also declared nothing unconstitional in States enacting poll taxes[12] and in their violation of the one person, one vote doctrine,[13] stated that

> The poor and the minorities have had access to the political process and have done well through it.[14]

For Judge Bork enough is enough; minorities have had their day.

Further, Judge Bork would afford less protection to racial and ethnic minorities as well as women. His articulation of a reasonable basis test for evaluating equal protection claims reflects a startling lack of awareness of this country's history of discrimination. The Supreme Court in adopting the three-tiered approach to equal protection analysis recognized the myriad forms of discrimination practiced against racial and ethnic minorities and women and, to its credit, formulated a high standard of review designed to guard the country against its own past patterns and practices. By treating all forms of discrimination alike, Judge Bork fails to appreciate the perniciousness of racial and ethnic discrimination which this country has struggled to disavow.

The Puerto Rican Legal Defense and Education Fund strongly urges that this Committee review this nomination with an eye toward protecting a Constitution that treats all of us equally; that protects core individual rights in the face of over-reaching state inititatives. Both the "old" and the "new" Robert Bork should be reported out of this Committee with an unfavorable recommendation. We ask that you add his name to the long list of rejected nominees, such as George Woodward, Jeremiah Black, John Parker and Harold Carsewell. As the person who stated that "the only cure for a Court which oversteps its bounds that I know of is the appointment power,"[15] Judge Bork has demonstrated a disdain for decades of Supreme Court jurisprudence. The confirmation of Judge Bork to the Supreme Court would disserve this country's proud legacy of jurisprudence and would send a message to the historically disenfranchised minorities of this country that their rights will no longer be protected. Judge Bork represents too high a risk of danger to our Constitution and our country.

FOOTNOTES

1. Westbury v. Sanders, 376 U.S. 1, 17 (1964).

2. New Republic, "Why Americans Don't Vote," September 7, 1987.

3. Id.

4. Pachon, Harry P., "An Overview of Hispanic Political Participation," September 18, 1981, and Paper Presented at Congressional Hispanic Caucus National Symposium.

5. Lopez v. Dinkins, 73 Civ. 695 (S.D.N.Y); Torres v. Sachs, 381 F.Supp. 309 (S.D.N.Y. 1974); Marquez v. Falcey, Civ. No. 73-1447 (D.N.J. Oct. 1, 1973); Arroyo v. Tucker, 372 F.Supp. 764 (E.D.Pa. 1974); Puerto Rican Organization for Political Action v. Kusper, 490 F.2d 575 (7th Cir. 1973); Vargas v. Calabrese, Civ. No. 85-4725 (D.N.J.).

6. 42 U.S.C. 1973b(3).

7. Katzenbach v. Morgan, 384 U.S. 641 (1966).

8. Id. 384 U.S. at 652.

9. Testimony of Robert Bork, U.S. Senate Committee on the Judiciary, Subcommittee on Separation of Powers, Hearings on S.158, Human Life Bill, 1982.

10. "It enables Congress in case the States shall enact laws in conflict with the principles of the amendment to correct that legislation by a formal congressional enactment." - Statement of Senator Howard introducing the enforcement provision of the 14th Amendment. Cong. Globe, 39th Cong. 1st Sess. 2766, 2768 (1866).

11. See generally, Testimony of Robert Bork, supra, note 9.

12. Nomination of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings Before the Senate Comm. on the Judiciary, 93 Cong. 1st Sess. at 5, 16-17 (Statement of Robert Bork).

13. Bork, Robert, The Supreme Court Needs a New Philosophy, Fortune 138, 163 (Dec. 1968).

14. Bork, The Impossibility of Finding Welfare Rights in the Constitution, 3 Wash. U.L.Q. 695, 701 (1979).

15. Nomination of Robert Bork to U.S. Court of Appeals, Hearings Before the Senate Comm. on the Judiciary, 97th Cong. 2d Sess. 1982.

JUDGE BORK'S LEGAL PHILOSOPHY

by John C. Roberts
Dean & Professor of Law
DePaul University
College of Law

It is particularly surprising in this 200th year of our Constitution that President Reagan should propose for the Supreme Court a man so at odds with our constitutional tradition, whose writings about the Constitution show such a narrow and mistaken view of its fundamental purposes, as Judge Bork.

Everyone who values the Constitution, and the crucial role of the Supreme Court in protecting individual liberty against the state, should be concerned about this nomination.

Preliminarily, we have to ask ourselves about the proper criteria to be applied to this nomination -- what tests should we apply in deciding whether a particular person should be confirmed for a seat on the United States Supreme Court?

First, the nominee must be a person of high integrity and spotless character. It is conceded by everyone, I believe, that Judge Bork is a fit nominee in these respects.

Second, the nominee should be a person of excellent professional skills and solid career attainments as a lawyer. Certainly there is no problem here, as even Judge Bork's critics agree.

Third, it could be argued that one should look at the political ideology of the nominee. While this has sometimes been lurking under the surface in debates over certain nominees, political ideology is not really relevant except as it translates into attitudes on specific legal issues. Political ideology and positions on legal issues do not always go together in predictable ways, and many important legal issues are not very susceptible to political coloring at all. This is the underlying reason why some nominees have disappointed the Presidents who appointed them -- while they were political allies of the President when they were nominated, that was an unreliable basis

on which to predict their votes on legal and constitutional issues in later years.

Finally, we come to the criterion of legal philosophy. Here I think the nominees' views are highly relevant. The Supreme Court plays a unique role in our legal system, because of the institution of judicial review. It is the final arbiter of the scope of governmental power, the interpreter of the Constitution, and the protector of individual rights against encroachment by the federal and state governments. Our law is an evolving organism, not a static set of rules, and we are entitled to ask ourselves about the state of the law under the nominee in question, how his or her votes will affect legal and constitutional principles we think are important.

The problem is that evaluating legal philosophy is tricky. We have the natural human tendency to support nominees we think will decide cases according to our own views, and oppose those who will vote the other way. We then cloak our views in the mantle of judicial philosophy. In one sense there is nothing wrong with this approach. The nomination and confirmation of justices is a political process in the highest sense. It has always been that way and the framers apparently intended it to be so. We shouldn't apologize for it. Indeed, the President in his appointments to the federal bench and his nominations to the Supreme Court has without question been seeking men and women he feels will vote his way on a group of very important issues. He has been open about this, and there is no reason we -- and the members of the Senate Judiciary Committee -- can't be too.

Nonetheless, voting on the basis of a nominee's views on specific legal issues makes people nervous. Are there no tests of judicial philosophy that can be applied in a more neutral way? Are there no tests that we could apply to both liberal and conservative nominees? As a law teacher I have searched for such grounds as these to evaluate this nomination. I have concluded that there are tests of judicial philosophy that can be neutrally applied.

In most cases, these larger issues do not arise because few nominees have well developed or articulated judicial or constitutional philosophies. Many lawyers and judges are not on record as to the merits of past Supreme Court opinions. By convention and good sense, they are not asked in the confirmation process to say how they would vote on particular issues.

Judge Bork is a conspicuous exception. While not by any stretch of the imagination a constitutional scholar, he has as both a law teacher and a judge expressed himself clearly and repeatedly on his approach to constitutional issues and given his opinions on particular Supreme Court cases. His views are truly extraordinary, and people should try to understand them before they make up their minds on his fitness to sit on the Supreme Court. I believe that these legal and constitutional views are not just wrong -- for within a healthy range of disagreement about these matters rightness and wrongness is very hard to determine and not very important. I would like to argue that his views are so wrong as to be outside the mainstream of American legal thought, outside any reasonable range of expert opinion.

President Reagan has portrayed Judge Bork simply as an advocate of judicial restraint -- one who believes in confining adjudication to the bounds of the Constitution and in limiting the creativity of the courts to inject their economic and social views into their opinions. But as Professor Philip Kurland of the University of Chicago pointed out in his recent Tribune piece, Judge Bork's views cannot be fairly described as traditional conservative judicial restraint. He is not a Harlan or a Frankfurter, who felt that judicial power was too important to be squandered on issues not appropriate for judicial resolution. Judge Bork is truly a radical in matters of constitutional philosophy. And most of that radicalism takes the form of hostility to individual liberty and to the guarantees of the Bill of Rights.

A careful reading of some of Judge Bork's articles and speeches reveals this:

First, he does not seem to believe that there are any moral values by which laws can be tested. He adheres to a severe moral relativism that is perhaps understandable in one who believes in Chicago School economics. Every statement that conduct should conform to a particular standard is simply a demand for gratification. No demand is any more valid than another. There is no overriding standard by which to judge conduct.

Second, Judge Bork does not believe that there is any general philosophy of government inherent in the Constitution, aside from the particular guarantees written into it. He does not see in the Constitution or the Bill of Rights any more general moral or political principles by which government power is to be judged or tested.

Finally, he believes that there is only one way to discern meaning in a constitutional provision, and that is by determining what the framers intended that provision to cover.

What is extraordinary about these views is that they have led Judge Bork, in a series of polemical articles and speeches that contain little scholarly analysis or research, to condemn virtually every important opinion of the Supreme Court dealing with individual liberties and civil rights in this century. I should emphasize here that we are not talking about the list of opinions one would expect to be condemned by a committed conservative -- Roe v. Wade, the school prayer cases, Bakke and the like. His list includes for condemnation in the strongest terms cases of the Court which have outlawed racially restrictive covenants, protected the individual against state efforts to outlaw contraception, prevented a state from forcibly sterilizing prisoners, and condemned gerrymandered political districting. In a 1971 article, he also condemns opinions of the Court protecting the people from prosecution for advocacy of overthrow of the government in the absence of a clear and present danger of disorder. Needless to say, many of these opinions were delivered by conservative judges speaking for large Supreme Court majorities. They represent settled precedent, and have entered into our legal landscape as givens. Few scholars agree that even a few of

these cases were wrongly decided, let alone all of them.

This, then, is why I oppose the nomination of Judge Bork, and why I think every American, conservative or liberal, should seek to understand his unusual legal philosophy. It can be summed up in an extremely narrow view of the purposes of the Constitution, the role of the Supreme Court and the value of individual liberty in our society. Let me briefly discuss why I think the philosophy that leads him to these strange positions is misguided.

As for this first notion, that there are no values inherent in the law, but only competing claims for gratification, it is a view rejected by most judges and lawyers, and especially by those who view themselves as conservatives. Bork's writings on this point exhibit a strong anti-intellectual strain, as he pokes fun at what he calls "academic" moralizers and condemns any and all efforts to think clearly about the moral basis of law. Certainly I would be hard-pressed to oppose the nomination of lawyer or judge on the basis of his particular views of the moral basis of law. But to think of one who believes that law has no moral anchors at all on the Court -- that gives me pause.

Perhaps even more startling is Judge Bork's assertion that no particular philosophy of rights informed the Constitution. I say more startling because we know a good deal about what the framers thought and said about the Constitution. There has been much recent historical work -- none of it by Judge Bork -- on the intellectual origins of the Constitution and on the ratification process. In my opinion it is ludicrous to argue that Madison and his colleagues had no political philosophy from which the Constitution and the Bill of Rights were drawn. They wanted to create a limited government that preserved a whole range of important rights to the people. They carefully balanced the powers of that government to protect the individual from the tyranny of temporary majorities or an autocratic President.

Finally, what of Judge Bork's much discussed idea that the scope of the Bill of Rights and other provisions of the Constitu-

tion is determined solely by the intent of the framers at the time and by the words themselves. He emphatically denies not only that judges can create "new" rights, but that specific rights can be expanded beyond their core meanings. He would give as an illustration of such expansion the so-called "privacy" right articulated in a long series of cases over the last twenty years.

There are several serious difficulties with this extreme view of constitutional interpretation. "Original Intent" is a slippery business and can really mean many things. In Judge Bork's hands it becomes a method of denying validity to the values of the Bill of Rights, and brings about strange and inconsistent results.

First of all, as Professor Ronald Dworkin has convincingly demonstrated in a recent article, "original intent" itself is a concept that leaves much room for choices of values, a process that is inherent in all adjudication. This is because the framers of the Constitution intentionally phrased their provisions in broad language; there is excellent evidence that they did this not out of ignorance or inadvertence, but precisely because they were enshrining general principles of government that they wanted to endure. Madison, Hamilton and others, it will be remembered, originally opposed inclusion of a Bill of Rights in the Constitution because they feared the argument that individual freedoms would then, by implication, be limited to those precisely enumerated. They added a ninth amendment preserving other rights of the people for this reason. At any rate, to give meaning to a phrase like "Congress shall make no law abridging the freedom of speech", one cannot look only to the precise forms of speech then employed but to the general principle being articulated. Judge Bork would have us limit our understanding of the first amendment only to political speech, and seems not to believe that artistic expression, for example, or advocacy of overthrow of the government unrelated to any action, should be protected.

Judge Bork's intentionalist theory has particular problems when dealing with the Fourteenth Amendment, which says that all citizens are entitled to equal protection of the laws. He would give effect to that statement only to protect blacks against racial discrimination, because he asserts that was the sole intention of those who wrote ratified the Amendment. Yet that position, which is shared by very few scholars and almost no judges, leads us to the absurd position of denying the general principle from which the Amendment was derived -- that discrimination based on nothing more than blind prejudice is harmful and should not exist in a free society. Do we really want a justice who seems to believe that "equal protection of the laws" does not apply to gender discrimination?

Judge Bork's difficulty in applying this concept is illustrated by the fact that he believes the landmark case of Brown v. Board of Education was correctly decided. That case, which ruled that separate but equal schools violate the Fourteenth Amendment, is an illustration of applying the underlying principle of a constitutional provision and not precisely what the framers intended or discussed, since the legislators who wrote the Fourteenth Amendment clearly believed in separate but equal schools. Indeed, they maintained a segregated school system in the District of Columbia for many years thereafter. Judge Bork's intentionalist theory and his approval of Brown simply can't be reconciled.

Once you free yourself from the literal meaning of the words written by the framers, which even Bork would do to avoid such absurdities as not including television and radio in the concept of the press, there are value choices to be made in defining what principle lies behind the provision. This is an inevitable process. By denying its validity, Judge Bork is left with an extremely cramped and narrow vision of the Constitution, which manifests itself particularly in areas of individual liberty.

It is in this sense, then, that Judge Bork's view of the legal world is truly radical. Lawyers and Judges are used to

applying principles articulated in earlier cases to new situations, and arguing from analogy to determine whether the principle covers the new case. This is how our system adapts and responds to changing needs, while maintaining its roots in the Constitution. No conscientious judge, liberal or conservative, tries to create new rights not found in the Constitution, as Judge Bork implies. In a very real sense, Judge Bork rejects the entire system of Constitutional thought developed over the last 100 years or so, and it leads him to the radical position of denying the validity of large parts of our accepted constitutional law.

I hope that it is possible to make a judgement, as I have argued, that Judge Bork's influence on the Supreme Court would be profoundly wrong, apart from my opinions about the rightness or wrongness of particular past decisions which he attacks. Our justices personify our legal traditions and our Constitutional values. We can be tolerant of idiosyncratic legal views on our lower federal courts, but their influence is greatly magnified on the Supreme Court. Justices should not be too far out of touch with the normal range of expert legal opinion, or in fact with the feelings and commitment to liberty of the American people. On this sort of test of fitness, it seems to me that Judge Bork, talented as he is, clearly fails.

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San Francisco
Lawyers' Committee
For Urban Affairs

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October 1, 1987

Senator Joseph R. Biden, Jr.
Chairman, Senate Judiciary Committee
U. S. Senate
Washington, D. C. 20510

Re: Judge Robert H. Bork

Dear Senator Biden:

I am writing on behalf of the San Francisco Lawyers' Committee for Urban Affairs to express our opposition to the nomination of Judge Robert H. Bork for Associate Justice of the United States Supreme Court. I have enclosed a copy of the resolution adopted by our Executive Committee in opposition to the Bork nomination.

The San Francisco Lawyers' Committee was established in 1968 by leading members of the San Francisco Bar to advance the civil rights of low income and minority individuals. Committee staff and volunteer attorneys provide free legal assistance and representation to needy clients on individual matters and in the development of policies which affect their rights and entitlements. Each year more than 700 attorneys in private practice participate in the Committee's pro bono program.

After careful consideration of Judge Bork's views, the Committee has concluded that his previously stated and probable future interpretations of constitutional and statutory principles, if they were to prevail, would severely and adversely affect Committee clientele. The Committee strongly urges the United States Senate to reject his nomination.

Respectfully yours,

Mark N. Aaronson

Mark N. Aaronson
Executive Director

encl.
c.c: Senate Judiciary
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Resolution of the Executive Committee of the San Francisco Lawyers' Committee for Urban Affairs In Opposition to the Nomination of Robert H. Bork to the Supreme Court of the United States

Whereas, Judge Robert H. Bork has been nominated to the Supreme Court in large part because of his publicly expressed positions on constitutional issues affecting the civil rights of individuals;

Whereas, the United States Senate has a constitutional duty to provide advice and consent on nominations to the Supreme Court and the Senate's historical and appropriate duty requires active scrutiny of a nominee's constitutional philosophy;

Whereas, Judge Bork has repeatedly stated that he would reverse long-standing constitutional doctrines established by the Supreme Court to protect individuals against intrusive governmental action, to provide access to the institutions of government by classes of citizens historically denied such access, and to insure that all individuals are afforded equal protection and due process of law;

Whereas, Judge Bork's theory of "original intent" would reverse the continued development of constitutional principles in light of changing political, economic and social circumstances;

Whereas, Judge Bork's public statements and actions and his judicial opinions raise serious questions regarding his commitment to established constitutional doctrine; and

Whereas, if the constitutional principles espoused by Judge Bork were to prevail, those individuals in our society served by the San Francisco Lawyers' Committee for Urban Affairs would be the most adversely affected and the San Francisco Lawyers' Committee for Urban Affairs would be hindered in carrying out its obligation to protect and insure through the courts the civil rights of those individuals,

Now therefore, be it resolved, that the San Francisco Lawyers' Committee for Urban Affairs opposes the confirmation of Robert H. Bork as a Justice of the United States Supreme Court and urges the United States Senate to reject his nomination.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

September 22, 1987

The Honorable Joseph R. Biden, Jr., Chairman
The Honorable Strom Thurmond, Vice Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senators Biden and Thurmond:

As a teacher of constitutional law at a prominent law school, I have been recently inundated with a barrage of requests that I sign this or that letter about the nomination of Robert Bork to be an Associate Justice of the Supreme Court. I write this letter in part because none of the various letters comes particularly close to reflecting my views.

It has been tempting not to write at all. Although I see nothing wrong with scholars of constitutional law bringing their thinking about these issues to bear on matters of public importance, I also see nothing wrong with the view that it is precisely the task of the scholar to think about issues from a vantage point removed from the inevitable oversimplifications and distortions of day-to-day political debate. To the extent that scholars become political actors, and to the extent that scholarship is seen as a weapon in a public or private dispute, the risks to the attitude of detachment and freedom to challenge the unchallengeable that I take to be definitional of the scholarly enterprise are seriously threatened.

Despite this, however, it is clear that neither your world nor mine subscribes to this view to any great extent, and the result has been the wholesale entry of much of the legal professoriate into this issue. The consequence of this is that it is increasingly impossible to stay out of the fray, because even silence is likely to be interpreted or misinterpreted. Rather than risk being designated as a supporter merely because I do not sign a letter of nonsupport, or a nonsupporter merely because I do not sign a letter of support, I have decided to offer my own views in my own words.

Central to my thinking about this issue is a focus on the work of the Supreme Court. Judge Bork has been nominated to do a particular job, and it thus seems necessary to think, quite seriously, about the job description. I restate these seemingly obvious points as a way of indicating that it is also important to think about what Supreme Court Justices do that might distinguish their task from that of other actors in the constitutional system, including political figures and lower court judges.

As a court of limited jurisdiction, as an appellate court, and as a court with discretionary control over its own docket, the Supreme Court deals with a limited number of cases selected by a process that could hardly be called either random or representative. Most constitutional issues never get to court at all, and that is because constitutional language or existing precedent makes the issue so clear that no one would think it worthwhile to contest the matter. Even if he desired to run for a third term, I assume that neither President Reagan nor his advisors would take the issue to court, and that it just because the Twenty-Second Amendment makes preclusion of a third term so clear that litigation would be futile. Indeed, an essential feature of the effective functioning of the constitutional system is precisely the fact that those constrained by the Constitution take those constraints seriously, and properly recognize that they have obligations not to do what the Constitution does not permit them to do.

Thus, most cases that wind up even in a lawyer's office, and certainly most cases that wind up in any court, are those in which existing legal materials such as statutory and constitutional texts and authoritative judicial decisions leave some room for doubt, some room for argument. In most cases, therefore, the sources of "law" in some strong positivist sense will have run out, and the decision will go beyond mere mechanical application of existing law into the domain in which social

political, economic, moral, and related considerations will fill the gaps between the clear commands of existing legal materials.

This process of filtering out the easy cases continues as we depart the trial courts and ascend the appellate system. The various incentives relating both to settlement and to investing time and money to go one step further are likely to be such that by the time a case is one of the 4000 plus cases that are filed in the Supreme Court every year, it is likely to be one in which legal arguments can plausibly be made on both sides, and in which, therefore, nonlegal considerations will often be the determinative factor. And once we recognize that a further screening process reduces these 400 plus cases to about 150 (159 in the 1985-1986 Term) that receive full consideration and get full opinions by the Supreme Court, we realize that we are dealing, for those 150, with a quite special and indeed peculiar set of cases, ones in which, by the very nature of the selection and filtering process, the traditional legal skills of text-reading, case analysis, and law application are likely not to suggest that one answer is better than another. Instead, for this tiny corner of the law, application of these skills will still leave a decision to be made, but a decision, lawmaking much more than law application, requiring the exercise of political, social, moral, economic, and constitutional judgment, and the deploying of substantive views about all of these topics.

This, if we focus on how cases get to the Supreme Court, and thus on what Supreme Court Justices have to do, we see that theirs is a task that is quite different from that of other lawyers and other judges, and inevitably involves them in the making of decisions of policy and principle. And when we see Supreme Court Justices, especially if not uniquely, as dealing in policy and principle, it becomes apparent to me that the task of selection goes far beyond technical skills and intelligence, and involves not only a nominee's general way of dealing with questions of policy and principle (which may include deferring those decisions to some other institution), but also the substantive views that emerge from that process.

When I distinguish the legal from the non-legal, or when I distinguish the legal from the political or the legal from the substantive, I mean to put on the non-legal side of each of these dichotomies questions relating to how the Constitution ought to be interpreted, questions about the role of the Supreme Court in that process, questions about allocation of decisional authority in the country as a whole, and questions about the respective uses of, for example, text, original intent, precedent, and other factors in constitutional interpretation. I call these "non-legal" not because they do not involve questions about the law, but because they involve fundamental choices not themselves determined either by other authoritative documents or by any consensus within the legal professional community. Thus, determinations of these matters by the country's highest court, not responsible to any higher court, and not resolved by the document itself, will inevitably involve Supreme Court Justices in a form of decisionmaking that is far removed from application of the law to particular cases. And it is this form of decisionmaking, distinguishable from law application, that I take invariably to involve substantive choices of the most foundational variety.

The upshot of all of this is that it ought to be a sufficient condition for me to oppose (and I will deal presently with whether it is a sufficient condition for you as a Senator to oppose) a nominee that that nominee has political, moral, social, and economic views, as well as views about the role of the Constitution, the role of the judiciary, and the interpretation of the Constitution, with which I disagree. With respect to Judge Bork, the public debates of the last few months have been misleading more than they have been accurate. Whether one agrees or disagrees, it is clear to me that criticism of the reasoning in Shelley v. Kraemer has been mainstream academic constitutional thinking for much of the thirty-nine years since it was decided. Similarly, the view that both Griswold and Roe were tough cases has been part of mainstream academic constitutional thinking, and much the same could be said for a number of other cases that Judge Bork has criticized. Now all of this may say only that something is wrong with the mainstream, and that may very well be the case. Nevertheless, in many of these areas the charge that Judge Bork is in some way radically out of step with almost all of his academic professional peers is, at the least, seriously overblown. I would not say the same thing about the views of the coverage of the First Amendment expressed by Judge Bork in his 1971 article. The mainstream there is considerably more protective, even on its least protective wing, than the views expressed in that article, and in that area it seems fair to criticize these views as being extreme from the admittedly limited vantage point of contemporary American academic constitutional thinking. That is not to say that those views are wrong, although I am convinced that they are. Many quite civilized and democratic societies exist with free speech protection not substantially greater than that advocated by Judge Bork in 1971, and it is simply mistaken to view views

about free speech that are extreme by contemporary American standards as being morally beyond the pale in a way that condonation of torture or genocide would be.

As I have explained, however, the question for me is not whether Judge Bork is beyond the pale, for on most issues I do not think he is. The question for me, given the inevitable nature of Supreme Court adjudication, is whether I think he is right or wrong. At the Supreme Court level, I cannot separate the question of whether someone would be a good or bad justice from the question of whether I think their substantive constitutional, moral, political, social, and economic views are ones I would like to see made part of the law of this Nation. Insofar as most of what the Supreme Court does is lawmaking in one form or another, or substantive decisionmaking about the process of lawmaking, it follows that it is appropriate in thinking about a nominee to think about whether one would welcome or reject most of the law or most of the decisions that that nominee would make. It is quite clear to me that I would reject it, especially but not exclusively in areas relating to interpretation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, and thus the basis of my objections to Judge Bork is that Supreme Court steering of the substantive direction of American policy and principle is intrinsically part of the Supreme Court adjudication, and I have strong disagreements with the direction in which Judge Bork would steer those policies and principles.

My disagreements with Judge Bork extend as well to my perceptions of the methods he will bring to bear in thinking about substantive issues for which he has yet no fixed views. For example, I have argued even before it became fashionable that nothing in the nature of language, law, or constitutionalism requires recourse to original intent in making constitutional decisions, and thus such recourse is itself a political decision about narrowness, about judicial power, and about the flexibility of the law. On these political issues Judge Bork's views, no more or less political than the views of those with whom I agree, are substantially different from my own. Moreover, as a general question of intellectual style, I prefer the anguish of minds continuously reexamining their previously held views to the combat of even carefully worked out but less flexible positions. I do not think that Judge Bork's relative (although far from total) unwillingness to see the best in opposing arguments rather than the worst is much different from that of many people with whom I agree in outcome, and I do not think that some of the inconsistencies between his general justifications and specific applications distinguishes him from many people whose specific applications would come closer to my own. Nevertheless, these are traits I do not admire in general, they are traits I would not like to see further represented on the Supreme Court, and they are for me significant negatives not only for Judge Bork, but also for many whose results I am more likely to applaud.

To say all of this, of course, is still not to say anything about the respective roles of the Senate and the President in the selection process. It is, however, to say that because substantive political, moral, economic, social, interpretive, and institutional views are inevitably part of the job, the power to advise and consent would be largely meaningless if they could not touch what is to me an essential and inextricable part of the position of Supreme Court Justice. I recognize that to say this is to take the risk that it would apply in the future to nominees whose views and styles diverge less from my own than do those of Judge Bork. But that does not trouble me, for I think the country will be better off in the long run from the candor such a process would produce than it would lose from the inability to appoint some people I would like to see appointed. I also recognize that to take this position now is to set the Senate on a different course from that it has recently followed, however much there may be occasional precedents for such a non-deferential role. But it is precisely one of the things that distinguisnes legislatures from courts that we expect the former to be less constrained by precedent than the latter, and I do not take the primary theme of past practices as suggesting that legislative bodies act illegitimately when they depart from those past themes in the exercise of their authority.

I make these observations about Senatorial prerogative with some trepidation, not because I distrust the Senate, but because the events of the last few months with respect to this nomination hardly inspire confidence that public deliberation of these matters will be accurate, balanced, calm, fair, sophisticated, or probing. Instead we have seen misstatements, distortions, exaggerations, oversimplifications, and grandstand plays that have, in this Bicentennial year, done great harm to public perceptions of constitutionalism in America. I regret the role that parts of the legal academy have played in contributing to rather than guarding against this unfortunate process. Nevertheless, these events do not lead me to be irretrievably pessimistic about the process of public debate, and I can only hope that it will go better after we become somewhat more accustomed to it.

Thus, my conclusion is that if a member of the Senate thinks that in performing the invariably political task of serving as a Justice of the Supreme Court, a nominee would make those political choices in a way that differs significantly from the way in which they would be made by one expected to advise and consent to his or her nomination, then it is appropriate for that reason to withhold that consent. Applying that standard to this case, I urge you to consider Judge Bork's substantive views carefully, and I urge you to withhold your consent.

I would be most grateful if you would make this letter available to other members of your Committee.

Yours sincerely,

Frederick Schauer
Professor of Law*

FSirr

*I take it to be obvious, but nevertheless worth repeating, that I speak only for myself, and not for the University of Michigan or the University of Michigan Law School.

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

LOUIS B. SCHWARTZ
Professor of Law

September 10, 1987

U.S. Senator Patrick J. Leahy
Senate Office Building
Washington, D.C. 20515

Dear Senator Leahy:

I enclose copies of two letters I have prepared for the press, strongly opposing Robert Bork's confirmation. I bring these to your attention in view of the imminence of the hearings, with the request that they be incorporated in the record.

There is good reason to believe that my views represent those of a majority of my colleagues at this Law School and others, especially of those specializing in antitrust, constitutional law, and civil liberty.

Sincerely,

Louis B. Schwartz

LBS:en
Enclosures (2)

200 McALLISTER STREET • SAN FRANCISCO, CALIFORNIA 94102-4978 • (415) 565-4673

9/8/87

Bork: Why Conservatives Should Oppose Him

The Bork nomination should trouble those who share his conservative views as well as those who disagree. That is because conservatives as well as liberals value confidence in the courts. There are three reasons why Bork undermines that confidence. (1) His own intellectual integrity is dubious. He pretends to believe in interpretation according to "original intent" and in "judicial restraint," whereas in practice he is a radical activist in reading his own political and economic views into the law. (2) His nomination is an open attempt by the Reagan administration to "pack" the Court in favor of the President's "agenda," comparable to President Roosevelt's failed attempt to pack the conservative Supreme Court of the 1930s with new liberal votes. (3) Bork's own political agenda so plainly dominates his thinking that lawyers and litigants who lose controversial cases before him will believe that issues are decided before and with little regard for facts and arguments. A judge known to have a closed mind cannot win respect for his decisions.

Bork's intellectual integrity is impugned by his pretending to interpret the Constitution and statutes according to "original intent." That is an absurd position anyway, since the Founding Fathers of the 18th Century could not have had intentions with regard to the novel problems of our time. Even as to the issues of their day, views and intentions were diverse. In any event,

Bork's readiness to let his own views override "original intent" stands fully revealed in his treatment of the antitrust laws. In his book, The Antitrust Paradox, he claims that "efficiency" and optimal "allocation of resources" are the only rational goals of the antitrust laws. But the "original intent" of the Congress of 1890 that passed the Sherman Act was unquestionably otherwise. There was not a word in the Congressional debates about such economic speculations. The economic obsessions of the "Chicago School," in which Bork was trained, did not emerge until three quarters of a century later. Nor is it plausible to suppose that, when the United States imposed antitrust on the legal systems of Germany and Japan after World War II, we were concerned with prior "inefficiency" of our defeated enemies. So much for Bork's pretended deference to "original intent."

As for "judicial restraint," by which Bork and the Reagan administration mean judges' deference to Congress and the Executive as well as to judicial precedent, the record is clear that Bork scorns legislation with which he disagrees:

> "...courts have obligations other than the mechanical translation of legislative will, and these obligations are particularly important with statutes as open-textured as the antitrust laws." (Paradox at 72.)

> "No court is constitutionally responsible for the legislature's intelligence, only for its own. So it is with the specific antitrust laws. Courts that know better ought not to accept delegations to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary." (Paradox, p. 410.)

That Bork arrogantly "knows better" is clear from his characterization of antitrust legislative and judicial

developments as "pernicious" (Robinson-Patman anti-discrimination statute, Paradox, p. 382), "disastrous," "horrors" (antimerger law and decisions, Paradox, pp. 201, 218), "perverse" (Judge Learned Hand's famous antimonopoly decision against Aluminum Company of America, Paradox, p. 170). So much for Bork, the crypto-activist apostle of "judicial restraint."

Although this analysis focuses on Bork's anti-antitrust crusade rather than his disturbing civil rights record, these two phases of his philosophy are not unrelated. The common theme is authoritarianism. To restrict the constitutional rights of individuals magnifies the political power of government and majorities over minorities. To oppose antitrust magnifies the economic power of the already-privileged. There is a deep consistency behind the shifty Bork facades.

The Reagan administration seeks to "pack" the Supreme Court so as to carry out its political agenda by reversing many Constitutional precedents. That is no secret. Such a maneuver undermines the independence of the Court, converts it into a tool of the Executive, and violates the Constitutional policy of separating legislative, judicial, and executive powers so that each department of government may act as a check on the others. On that ground, the country rejected President Franklin D. Roosevelt's effort to turn around the reactionary Supreme Court of the early 30s by enlarging its membership to accommodate new liberal appointees. Even liberals deserted that court-packing

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plan for promoting the liberal agenda. The Bork nomination shows no such scruples.

A recent sensational article in The New Yorker magazine reveals how zeal for the conservative agenda has already caused the White House and its Attorney General Meese to undermine the traditional quasi-judicial independence of the Solicitor General of the United States. Bork had previously demonstrated his subservience to the White House when, as President Nixon's Solicitor General, he fired independent prosecutor Archibald Cox after Bork's two superiors in the Republican Department of Justice resigned as a matter of principle rather than carry out Nixon's illegal order. The Bork nomination fits beautifully into the program of conquest of the Court by President Reagan.

Bork -- phony pretender to judicial restraint, phony adherent to "original intent" jurisprudence, but very real and authoritarian activist -- should not be confirmed by the Senate.

Louis B. Schwartz
Professor of Law
U.C. Hastings College of the Law
Emeritus Benj. Franklin Professor
of Law, Univ. of Pa.

9/10/87

"Moderate" Bork? Defender of the First Amendment?

Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), has been widely cited as evidence of Bork's "moderation," or even of his "liberal" credentials as a defender of freedom of the press. Actually, Bork's opinion in that case demonstrates his rightward activism. The case involved a libel suit by a Marxist professor against conservative columnists Evans and Novak. All too predictably Bork voted for Evans and Novak, aligning himself with a six-to-five majority in refusing to submit Ollman's case to a jury. What is astonishing is that conservative Judge Scalia (not yet promoted to the Supreme Court) was among the dissenters. Scalia joined in an opinion excoriating Bork for his "astonishing view . . . stripping the jury of its historic function" and for "an unprecedented extension" of constitutional law. Judge Scalia's own dissenting opinion is even more scathing. It is an attack on Bork's "subjectivity" (read "activism") in proposing a "creative approach" to constitutional law that permits "intentional destruction of reputation" because of a judicially perceived tendency of juries to award excessive damage verdicts. Thus, Bork has staked out an activist position to the right of Scalia.

Evans and Novak had charged that Ollman, an N.Y.U. professor who had been nominated to head the Political Science Department of the University of Maryland, was of low repute as a scholar and intentionally employed his classroom to promote revolution. The

legal issue, under Supreme Court precedents, was whether such statements were "fact" or "opinion." If opinion, the First Amendment gave absolute immunity to the defendants. If fact, the defendants were still entitled to immunity unless the facts were convincingly proved to have been maliciously falsified.

It was not an easy case and there was much to support the main majority opinion (not Bork's) that the specific statements should be classified as "opinion" when considered in the context of an argumentative column on the "op-ed" page of a newspaper, with a fair amount of disclosure of the underlying facts. But that was not enough for Bork. In his zeal against radicals and juries, he had to invent a new principle of constitutional law: that even "facts" could be maliciously falsified with impunity, if the maligned plaintiff "had entered the political arena." Besides, said Bork, a scholar's reputation was "inherently unsusceptible to accurate resolution by a jury." Scalia's scornful footnote declares:

> "the simple fact that, in assessing or mitigating damages, juries have historically been required to determine what a plaintiff's reputation was before the libel in order to determine how much the plaintiff has been injured by the libel."

The sum of Bork's position in Ollman is that if he thinks jury verdicts in libel cases will be excessive he will bend history and the Constitution to prevent jury trial.

Louis B. Schwartz
Professor of Law
U.C. Hastings College of the Law
Emeritus Benj. Franklin Professor
of Law, Univ. of Pa.

YALE LAW SCHOOL
401A YALE STATION
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JOHN G. SIMON

September 29, 1987

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on
the Judiciary
United States Senate
The Russell Building
Room 489
Washington, DC 20510

Dear Senator Biden:

During the course of my testimony before the Judiciary Committee on September 25, I commented on Judge Bork's commendable record with respect to racial justice, citing his writings in support of the central importance of racial equality under the Constitution and on the rightness of Brown v. Board of Education, as well as the aggressive litigating role he played in behalf of civil rights as Solicitor General. (I stated that I cared deeply about these racial justice issues because of my longstanding work as officer and trustee and officer of three organizations committed to civil rights and equal opportunity for minority groups.) I added that Judge Bork's civil rights record was not marred by his criticism of five race cases out of the scores that the Supreme Court has decided over the past 35 years (he expressed doubts that are widely shared in the scholarly world and on the Court) or by his criticism of the public accomodations title of the 1964 Civil Rights Act on the basis of a "libertarian" anti-regulatory philosophy long ago abandoned.

I should like to supplement my statement by commenting on recent assertions, made before the Committee and in the media, that give a misleading account of Judge Bork's criticisms. For example, William T. Coleman, Jr. stated, "When it has counted, Robert Bork has often stood against the aspirations of blacks ..." referring specifically to the 1964 public accomodations legislation and the 1965 and 1970 Voting Rights statutes. (N.Y. Times, Sept. 27, 1987, p. A35).

"When it has counted." If the phrase means that Judge Bork's actions had an adverse impact on pending cases or legislation, then we should consider the following:

-- Shelley v. Kraemer was decided in 1948; Judge Bork criticized it in 1971, 23 years later. (Incidentally, he was hardly alone: Professor Lawrence Tribe states that "the critical consensus" condemns the "state action" reasoning of Shelley.)

-- As for the 1965 and 1970 Voting Rights legislation, the reference must be to Judge Bork's criticism of the cases sustaining the literacy test provisions of these statutes, Katzenbach v. Morgan and Oregon v. Mitchell. The Katzenbach case was decided in 1966; Judge Bork criticized it in 1973, 7 years later, and again in 1981, 15 years later. The Oregon case was decided in 1970; Judge Bork criticized it in 1981, 11 years later. (Judge Bork's criticism of these decisions was based on an objection to what he regarded as Congressional undermining of "the Supreme Court's ultimate authority to say what the Constitution means"; this was the ground for dissents in Katzenbach by Justices Harlan and Stewart and was also the rationale for Judge Bork's testimony in 1981 against the Human Life Bill introduced by Senator Jesse Helms.)

Quite clearly, Judge Bork's criticism of these legal developments was entirely retrospective -- long after the fact, and not capable of having any effect whatever on pending decisions.

It is true that Robert Bork's criticism of the 1964 civil rights legislation took place while it was pending, in 1963, but it seems a little strenuous to say that this article in the New Republic by a fledgling law professor had the impact implied by the assertion that he "stood against" Black aspirations "when it has counted."

Perhaps "when it has counted" was intended by the author to have a broader meaning, referring not to an impact on pending legislation or cases, but to a more general failure to make a contribution to racial equality before the law. Read that way, the assertion is equally misleading, for Robert Bork has indeed

taken a civil rights stand "when it has counted" -- as Solicitor General, pressing racial justice claims in support of minority group litigants in important Supreme Court cases. Thus, he entered the Runyon v. McCrary case on the side of the black plaintiffs and helped to bring about a landmark decision invalidating racial discrimination by private schools. And he entered Lau v. Nichols on the side of the Chinese-American plaintiffs and helped to bring about another major decision, confirming that Title VI reaches non-intentional racial discrimination. In these and 16 other Supreme Court civil rights cases, Judge Bork advocated the cause of minority litigants -- and this work surely "counted."

This record can not be ignored on the ground that Solicitor General Bork was simply following Administration orders. Solicitors General have considerable leeway with respect to amicus briefs and arguments. Moreover, to the extent that such a filing decision is made at a higher level, the Solicitor General's views are obviously of great importance. And Judge Bork's associates in the S.G.'s office testified on September 28 to his aggressive role in pursuing civil rights cases.

I should like to ask that this letter be included in the record as a supplement to my written statement. I make this request because I believe it is quite important that Judge Bork's civil rights record not be misunderstood, especially in view of the New York Times report (September 27) that many Senators may base their confirmation votes on Judge Bork's stance on racial equality issues.

Sincerely,

John G. Simon
Augustus Lines Professor of Law

JGS/cd

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HAROLD B. RAMSEY
1902-1986

TO: United States Senate Judiciary Committee

FROM: I. B. Sinclair

RE: Robert H. Bork

DATE: October 6, 1987

Because of your time limitations, it has been suggested that I send in written remarks, a process which no doubt insures brevity.

At this stage of the proceedings, it is clear not only that Judge Bork should not be confirmed, but that his nomination should be withdrawn by President Reagan, thereby saving a great amount of time, and a great amount of anguish for members of the Senate. The Senate of the United States deserves better than to consider the matter as it now stands. Although I assume that Judge Bork opposes euthanasia, a mercy killing is in order at this time, if President Reagan has the courage to put Judge Bork out of his misery.

Be that as it may, in the assumption that every man deserves his day in court, the court in this instance being the United States Senate, and the individual being Judge Bork, I will cite a few items that have impressed me in the vast amount of information produced on the subject.

In the beginning, the major question seemed to be whether the United States Senate had the right to consider the nominee's ideology in advising and consenting to his nomination. The attached articles from the New York TIMES of July 5, Herman Schwartz's column of July 3, and the perceptive letters to the Editor of the Philadelphia INQUIRER of July 12 more than cover this point, which the Senate has already resolved in its collective mind. You certainly have the right to consider all aspects of the matter, an ideology is crucial.

Senator Kennedy has been verbally assaulted because of his initial reaction to the nomination of Judge Bork. To my mind,

Senator Kennedy has done the people of the United States and the United States Senate an invaluable service by focusing our attention on this nomination. There is a phrase that appears quite frequently in the Congressional Record: "If the trumpet make an uncertain sound, who shall prepare himself for battle?" Senator Kennedy has sounded the trumpet, and as in The Battle Hymn of the Republic, "He has sounded forth a trumpet that shall never call retreat". Senator Kennedy and Representative Gephardt touched on the most serious deficiency of Judge Bork, his actions at the time of the Saturday Night Massacre in 1973.

In the lives of most individuals, there often comes a time for decision that shapes the destiny of that individual. That moment came to Judge Bork on October 20, 1973. The question was not one of whether he could fire Archibald Cox, but whether he had the courage to say no. He made the wrong choice, and Senator Kennedy is absolutely correct when he stated that this "by itself" disqualifies him for the Supreme Court of the United States.

Judge Bork's decision needs to be measured by the example cited in the book Profiles in Courage, written by someone whose name escapes me at the moment. These individuals faced moral decisions, and they chose to do what was right. Judge Bork failed the test. Supreme Court Justices must be made of sterner stuff. There were a number of appropriate responses to Mr. Nixon's order, and Judge Bork chose the one that would forever brand him as wanting. James H. Rubin's article in the CENTRE DAILY TIMES highlights the point. The article of Kenneth B. Noble, in the Sunday New York TIMES of July 26, 1987 gives a comprehensive review of the Saturday Night Massacre.

There has been much testimony presented that has been truly impressive. Certainly Senator Specter's questions have cut through much of the confusion and this questioning has highlighted Judge Bork's deficiencies. The column of Claude Lewis, writing in the Philadelphia INQUIRER of September 23, 1987, covers his appraisal of the testimony of William T. Coleman, Barbara Jordan, and Andrew Young. I agree wholeheartedly with Mr. Lewis' conclusions.

From my point of view, one of the best articles did not deal specifically with the Bork nomination. Enclosed is a copy of an article on the judiciary, from TIME Magazine of July 6, 1987. It demonstrates the necessity for each citizen who feels wrong to be able to battle for redress of his grievance, taking the case, if necessary, to the Supreme Court of the United States. Some illiterate coined the phrase placed on license plates in Pennsylvania "You've got a friend in Pennsylvania". Each citizen needs

to know that he has a friend on the Supreme Court of the United States. Each citizen needs to know that he will have a fair hearing, and even if the result is not to his liking, a fair hearing enables our citizens to accept the results without resorting to violence.

Numerous witnesses have testified to the fact that Judge Bork believes in restricting the access to the court system. This is intolerable. This was one of the main reasons why I persuaded the Eastern Pennsylvania Group of the Sierra Club, and then the Pennsylvania Chapter of the Sierra Club, to oppose Judge Bork's nomination. I was pleasantly surprised to see that the National Sierra Club also adopted this position.

Perhaps the best example of what a Supreme Court Justice must mean to the American people is that of the late Chief Justice Earl Warren. Much of what Judge Bork has had to say about his own views of the Constitution remind me of the views of my law school professors before Chief Justice Warren had his impact on the judicial system. I will never forget how Chief Justice Warren came to the central issue that separates the sheep from the goats, and the Warrens from the Borks. Of course it horrified the narrow minded attorneys and law professors, but the key question propounded by Chief Justice Earl Warren, "but is it right", caused a revolution in our judicial system that can never be abandoned. Such simple words, such a simple question, but with such broad implications. In those days, the people of the United States knew they had a friend on the Court. Their friends grow fewer in number each day, but one thing is certain: Robert H. Bork is no friend of the people of the United States.

Although I disagree with a number of things stated by David R. Boldt, the Editor of the editorial page of the Philadelphia INQUIRER, I also attach his article from October 4, 1987. I conclude with his ending paragraph: "But he didn't say certain other things. He didn't, to be specific, talk about the court's role in protecting the rights of Americans. And I don't want a judge determining the balance of the Supreme Court who doesn't immediately list among his priorities the preservation of liberty and justice for all."

IBS/by

Letters to the Editor

Ideology is a fair basis to reject Bork

To the Editor:

This is in reply to James J. Kilpatrick (Op-ed Page, July 5), who seems to think that opponents to the confirmation of Robert H. Bork are power crazy liberals "determined to destroy a system of constitutional checks and balances" by rejecting Judge Bork solely on ideological grounds.

Correct me if I am wrong, but I was under the impression that those very checks and balances are there to *prevent* abuses of power by one branch of the government by dividing power among three branches. If, as Mr. Kilpatrick says, "presidents have the power to nominate; senators [only] have the power to confirm," then why give the Senate any say in the matter at all? The Senate was given a role in the decision process for a reason, not merely to act as a rubber stamp.

If the President can nominate someone on an ideological basis (as he most certainly has done), there is no reason the Senate cannot reject this person on the same grounds. As for any "unwritten rule," the Senate is under no obligation to base a confirmation or rejection on any perceived trend in the past. The senators should examine the nominee under any measure they choose to be appropriate for preserving the present and future health of the government and the country.

Wendy H. Schwartz
Philadelphia

Qualification

To the Editor:

In a July 3 editorial you said, "The Senate's job ... is not merely to determine if the nominee is 'qualified.' It must also weigh what impact his presence on the court is likely to have on the evolution of American law, justice and society."

In the name of common deduction, how can one be "qualified" if his presence on the court were, in the slightest way, inimical to our law, justice and society?

Can a thing be, at once, both qualified and unqualified? Do words have meaning? Or are they sometimes just meant to confuse? Such as when that's really the hidden intent?

Frederick Cooper
Wayne.

Letters should be brief and written on one side of the paper. Writers must sign their names for publication and each must give an address and a telephone number through which the letter can be verified, although neither street addresses nor telephone numbers will be published. The Inquirer reserves the right to condense.

Senate's power

To the Editor:

Your July 1 editorial "Supreme Court nomination will test Reagan and Biden" incorrectly stated that when "President Nixon failed to win Senate confirmation for two successive Southern conservatives, he settled finally on Lewis Powell." In fact Harry Blackmun was the justice named to the high court after Clement Haynsworth and G. Harrold Carswell were wisely rejected by the Senate.

The Senate asserted its power to advise and consent then and should do so again in the case of Robert Bork. Contrary to conventional thought, the Senate has the power and the responsibility to consider Judge Bork's ideology.

The President's campaign to retain control of the Senate in 1986 included repeated admonitions of the consequences of the judiciary chairmanship's falling into Democratic hands. The result was the shifting of eight seats and control of the Senate to the Democrats.

So as the Senate deliberates on whether to confirm President Reagan's nomination of Judge Bork it should also give careful scrutiny to all of the 5-4 Supreme Court decisions during the last 16 years in which Harry Blackmun was in the majority and then swallow hard while thinking of what might be the state of civil liberties and legal precedent in 1987 if the likes of Clement Haynsworth or Harrold Carswell had cast those crucial votes instead.

Bob Paolin
Wallingford.

The Philadelphia Inquirer

An Independent Newspaper

Published Every Morning by Philadelphia Newspapers, Inc.
400 N. Broad Street, P.O. Box 8263, Philadelphia, Pa. 19101

SAM S. McKEEL
Publisher and Chairman

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Executive Editor and President

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Editor of the Editorial Page

Sunday, July 12, 1987 Page 6-C

THE NEW YORK TIMES, FRIDAY, JULY 3, 1987

The Senate's Right To Reject Nominees

By Herman Schwartz

WASHINGTON

Every President tries to shape the United States Supreme Court to realize his special constitutional vision. The Constitution authorizes him, and his oath virtually obliges him, to do so. And this is what President Reagan is trying to do by nominating Judge Robert H. Bork for the Court's latest vacancy.

But the Constitution entitles the President only to try, not necessarily to succeed. The Framers divided the appointment power between the President and the Senate, just as they divided the treaty power. This sharing, which in the late Senator Sam Ervin's words, made "the Senate's role ... plainly equal to that of the President," was one of the many hard-fought compromises that made the Constitution possible.

Accordingly, if a Senator thinks a nominee will undermine his conception of the Constitution, the Senator has exactly the same right and duty as the President to protect his conception. It is not just a question of whether the candidate had high grades in law school or is a good and honorable lawyer. As Chief Justice William H. Rehnquist said almost 30 years ago, a candidate's views of the equal protection and due process clauses are equally important.

That this is precisely what the Framers intended was made clear right from the start and by those who probably knew best — those present at the creation.

On June 29, 1795, John Jay, Chief Justice of the United States, resigned to become Governor of New York. President George Washington offered the Chief Justiceship to South Carolina's John Rutledge, one of the most distinguished lawyers in America. With a popular President behind him, and a Federalist Senate, confirmation should have been easy.

And it would have been but for one thing. The controversial Jay Treaty with England had been ratified by the Senate just a few weeks earlier, and support for the treaty had become a litmus test of true Federalism. Mr. Rutledge, however, had attacked the treaty. Angry Federalist leaders urged the President to drop Mr. Rutledge. The President refused. Nevertheless, the Senate rejected the nominee, 14-10.

Three of the 14 no-votes were signers of the Constitution, including Oliver Ellsworth, a key figure at the Philadelphia convention, familiarly known as the father of the Federal judiciary, and a future Chief Justice himself. He surely knew a Senator's proper constitutional role.

The Rutledge episode is not unique. The Senate has rejected almost 20 percent of Presidential Supreme Court nominees, and an even higher proportion before 1900.

Ideology and politics often played a role in these rejections. In 1968, for example, 19 Republican Senators, including Howard H. Baker Jr. and Strom Thurmond of South Carolina, declared they would vote against President Lyndon B. Johnson's nomination of Abe Fortas as Chief Justice because Mr. Johnson was in his final year of office and they thought a new President — a Republican, they hoped — should be allowed to make that choice.

Equally important in the attack on Mr. Fortas was his liberalism. Conservatives like Sam Ervin of North Carolina, Mr. Thurmond, John L. McClellan of Arkansas and Everett M. Dirksen of Illinois lambasted Mr. Fortas for his views on law enforcement, obscenity, free speech, capital punishment, Federalism and many other issues.

They were constitutionally entitled to do so, whether they acted wisely or not. Constitutional experts of all persuasions agree with Prof. Charles L. Black Jr. of Columbia Law School that "in a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in a man's fitness" to be a judge.

Of some 27 rejections or withdrawals under fire, more than one-third were for ideological reasons. James Madison's nomination of Alexander Wolcott in 1811 was rejected, 24-9, because Mr. Wolcott was considered too partisan. James Polk's nomination of George Woodward in 1845 failed, 29-20 (despite a 21-month vacancy on the Court), because of Mr. Woodward's anti-immigrant attitudes.

Similarly, several of Ulysses S. Grant's appointments were turned down for their views on such issues as civil service. A nominee's views on slavery were crucial in at least two instances. In 1930, the Senate rejected Chief Judge John Parker of North Carolina because of antiunion rulings and antiblack remarks.

A history of 'no' to Court appointees.

None of these failed candidacies was challenged for lack of professional or ethical qualifications. In recent years, however, Senators have tended to overlook all but the most extreme ideological aberrations. The very conservative Antonin Scalia and Sandra Day O'Connor were virtually unopposed. No one ever seriously thought that either threatened to subvert the Constitution.

The nomination of Judge Bork poses just such a threat, however. In almost every context — remedies for racial discrimination such as busing and affirmative action, access to the courts, abortion, contraception, women's rights, state neutrality in religion, protection for free expression, constitutional protections for the accused — Judge Bork has condemned the Supreme Court's efforts. His conception of the judicial function as controlled by the original intent of the Framers would keep the Constitution in knee breeches and livery.

President Reagan, of course, shares Judge Bork's views, and that is one powerful reason why he nominated Judge Bork. Others, however, believe that this ideology threatens what Associate Justice Lewis F. Powell Jr. — whose retirement created the vacancy — called the "irreplaceable value" of judicial review in a democratic society: "Protection [for] the constitutional rights and liberties of individual citizens and minority groups."

Each Senator must decide independently whether confirming Judge Bork will preserve that "irreplaceable value." For two centuries, Senators have consistently made such judgments and for good reason — the Constitution demands it.

Herman Schwartz is professor of constitutional law at the American University and editor of a recent book on the Supreme Court under Chief Justice Warren E. Burger.

Saturday Night Massacre recalled

By JAMES H. RUBIN
The Associated Press

WASHINGTON — The Saturday Night Massacre, when two Justice Department officials resigned rather than fire the special Watergate prosecutor, is being recalled — and its significance debated — as the Senate prepares for hearings on the nomination of Robert H. Bork to the Supreme Court.

It was 14 years ago that Bork, then a little-known Justice Department official, was thrust into the national spotlight when he acquiesced to a presidential order to fire Archibald Cox.

The memories still linger.

Rep. Richard Gephardt of Missouri, a Democratic presidential candidate, called Bork "one of the villains of Watergate."

Sen. Edward M. Kennedy, D-Mass., said Bork "executed the unconscionable assignment that has become one of the darkest chapters for the rule of law in American history" and that "by itself" disqualifies him for the high court.

But Sen. Joseph R. Biden Jr. of Delaware, also a Democratic presidential candidate and an opponent of Bork's nomination, said the Saturday Night Massacre does not appear to be a serious problem for Bork in the upcoming confirmation battle.

ROBERT BORK

Biden, chairman of the Senate Judiciary Committee, said hearings will begin Sept. 15 on President Reagan's nomination of Bork to succeed retiring Justice Lewis F. Powell.

In the immediate aftermath of the Saturday Night Massacre, Bork was cast by many as the henchman of Richard Nixon, a president portrayed as dangerously close to usurping dictatorial power.

But in the tumultuous days that followed the incident, the nation's mood and its perception of Bork shifted as he pledged to maintain the independence of the special prosecutor investigating the Nixon administration.

It was 8:24 p.m. in Washington on Oct. 20, 1973 when presidential press secretary Ronald Ziegler announced Nixon's decision to fire Cox as special prosecutor in the Watergate scandal.

The decision stunned the nation.

Bork was the man who carried out the order to oust Cox.

Some telling testimony against Bork

The Philadelphia Inquirer
Op-ed Page
Wednesday, September 23, 1987
13-A

By Claude Lewis
Inquirer Editorial Board

No matter what the outcome of the nomination of Robert H. Bork to the Supreme Court, the nation will be wiser for the discussion of his proposed appointment by President Reagan.

Citizens who have never read or thought about the Constitution will better understand its profound role in history and see with new clarity its basis for extending justice.

Few confirmation hearings in history have created so much controversy as the current one for Bork, a man more wedded to theoretical law than to practical jurisprudence. The phantasmagoria of feelings both for and against the former Yale law professor seemed to leave the Senate Judiciary Committee wrestling with a problem almost too hot to handle.

But if the debate at times appeared too heady for committee members, it was a piece of cake for at least three witnesses who appeared before the panel on Monday. Former U.S. Secretary of Transportation William T. Coleman surprised the committee with his erudite arguments against Bork and his thorough knowledge of constitutional law. So impressive was Coleman that one member of the panel was prompted to suggest that Coleman would make a fine candidate for the position Bork seeks.

Just when the panel members appeared to have digested Coleman's commentary, Barbara Jordan lived up to her well-deserved reputation for eloquence, logic and stinging debate.

If any single member of the discussion was more consuming than Bork himself, it was Jordan, a woman who two generations ago might have been judged prematurely by the members of the very body she addressed as fit only to do their laundry or scrub their floors.

But as she made crystal clear, it was the Constitution that altered her fate, that saved her from the intellectual rubbish heap that once was the persistent and pathetic path of blacks in America.

What took place on Monday was a moment of high order. It was, in a sense ironic, that three blacks — whose forebears were legally enslaved under the Constitution — were on hand to teach members of the Senate the meaning of the rule and the significance of the court. Coleman, Atlanta Mayor Andrew Young and congresswoman-turned-law professor Jordan, with microscopic scrutiny and the steam of nearly evangelical emotionalism, appealed to the Senate committee to reject Bork's nomination.

"My opposition to this nomination is really a result of living 51 years as a black American born in the South and determined to be heard by the majority community," Jordan said with characteristic clarity.

Her deliberateness of speech, her careful enunciation, her high-powered dramatic sentences commanded everybody's attention.

" . . . I concede Judge Bork's scholarship and intellect and its quality and there is no need for us to debate that. But *more* is required. When you experience the frustrations of being in a minority position and watching the foreclosure of your last appeal and then,suddenly, you are rescued by the Supreme Court of the United States, Mr. Chairman, that's tantamount to being born again . . . "

Each time she invoked Judge Robert Bork's name it sounded awfully like an obscenity.

One senator tried to twist Jordan's words, to have her say that Bork is a "criminal" because she accused him of illegally firing special prosecutor Archibald Cox in the wake of the Watergate revelations.

"Every action of illegality does not a criminal make," Jordan said with calculated coldness.

And then, late in the day, Young, while not openly political views, spoke of how the Constitution rescued blacks in the South from the tyranny of local and state laws. He alluded to Rosa Parks, a Southern seamstress who only wanted to sit on the bus instead of standing for a white man. She finally found refuge in the law.

Young viewed the Constitution as a document of *people*, not judges, and finally told the Senate committee that if Bork's views had prevailed in decades past, "I might have been branded a terrorist and jailed for my participation in the civil rights movement instead of becoming the first black elected to Congress from Atlanta in more than 100 years."

Young expressed the belief that Bork is an "extremely well-educated man, but not necessarily wise."

But what bothered Monday's first three speakers was that the judge's theories seemed coldly devoid of any human consideration or emotion.

Bork argues that there is no constitutional right to privacy, therefore states may regulate or ban abortions.

He believes that women, unlike racial minorities, have no constitutional protections against the laws that discriminate against them. He says further that the First Amendment protects mainstream political speech, but it doesn't extend to subversive or obscene protests.

"Judge Bork's intellectual threat," Young said, "is a kind of game with him, it seems, but it's a game being played with other people's lives . . . "

Bork obviously had his detractors, but his supporters are legion as well. The Senate panel is heading for a showdown by Oct. 1. But it is clear to me, after Monday's testimony, that Bork is not deserving of confirmation.

JUDICIARY

The judicial Power of the United States, shall be vested in one supreme Court

ARTICLE III SECTION 1

AMERICAN SCENE

This Is Against My Rights!

Three who felt wronged—and determined to battle for redress

For three years Lloyd Carew-Reid, a classical guitarist living in New York City, played a cat-and-mouse game with Manhattan cops. What the man wanted to do was make music in the subway system, hoping his melodies would coax some change out of commuters' pockets. But there were rules against such conduct. In time Carew-Reid, an Australian, got down on himself for trying to make a living in so frustrating a fashion. Then one night a banal but correct notion changed his life. "This is America!" was his thought. "They can't do this to me! It's against my constitutional rights!" The musician and the First Amendment double-teamed the court and won. These mornings you can catch him happily playing below-ground Bach at 59th and Lexington, where he says, "It's a free world down here now."

So it goes throughout this litigious land. In Wisconsin, Selena Fox, a witch, is fighting local zoning laws so that she may conduct religious ceremonies on her property. In Oklahoma, Lucille McCord and Joann Bell, two mothers, successfully ended school prayer with a suit, then, after Bell was assaulted and her home burned, the women sued again and won undisclosed damages from the school district of Little Axe. In Montana, Donna Todd filed her tax return after typing on her 1040 form, "Signed involuntarily under penalty of statutory punishment." The Internal Revenue Service fined her $500 for filing a "frivolous" return. Todd and the courts battle on. Here and there, sanctuary, sanctuary, sanctuary is all the word. Kay Kelly of Tucson, for example, was placed under house arrest for refusing to give the name of the Guatemalan she had sheltered. She contended her right to keep silent on the name was a religious issue.

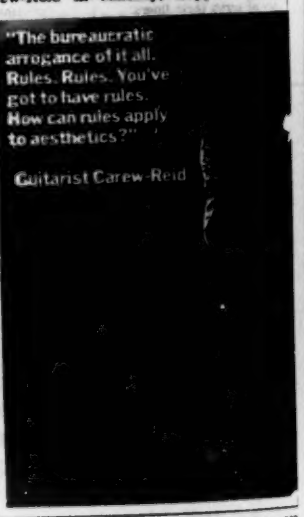
Well, one could go on, but the point is that the civil docket still makes room for more than whiplash, malpractice, what have you, still accommodates the citizen who has nothing grander to gain than the Republic's concession that he was right and it was wrong, which is pretty grand. In Louisiana, a Vietnamese schoolgirl, no bigger than a pencil sharpened to a nub, had no larger scheme than to publish a newspaper for the "out crowd" at her Louisiana high school, but she ran afoul of her principal nonetheless. In California, a black entrepreneur who sports a thick thatch of provocative dreadlocks and enjoys late-night strolls, even in white neighborhoods, didn't particularly care for being stopped 15 times for vagrancy. He felt that his looks, race and whereabouts were what had invited police inquiry and that these things added up to undue cause. Neither the schoolgirl nor the entrepreneur gave up; they went to the bench.

None of these people are larger-than-life Jimmy Stewarts in a Frank Capra piece; rather, they are obscure citizens who felt slighted on their home patch and sought redress. As subjects, they are what crusty journalists of another age called the "little people." Forty years ago, Joseph Mitchell, the *New Yorker* writer, bridled at this condescension: "They are as big as you are, whoever you are." With that in mind, herewith the cases of the guitarist, Carew-Reid; the student, Cat Nguyen; and the entrepreneur, Edward Lawson.

Lloyd Carew-Reid, the street musician from Perth, is a squirrelly little guy, blond beard, soft speech, 37 years old, who lives on the rim of the Chelsea area of Manhattan in a dog-eared hotel where drug deals and muggings go down every month or so, where one mad woman thinks she's a rooster. His home environment to some would seem a nightmare; his work environment to most would seem hell. After a day of breathing the iron filings in the New York City subways, one would think he could blow his nose and sink a Hudson River liner. Worse, a braking train in a tunnel in this town can sound like a ten-ton banshee caught in a vise. And yet there he sits, caressing an acoustic guitar in bedlam, playing Bach and Mozart, Francisco Tarrega and Erik Satie, and one of the reasons he got his back up about it was that the city had the gall to hit him with an environmental charge: making unnecessary noise.

In 1985 the Metropolitan Transit Authority issued 3,000 summonses for "unauthorized noise through a reproduction device," a catchall ordinance that covered radios as well as musical instruments, amplified or no. In April of the following year, Carew-Reid was also ticketed three times for "solicitation for entertainment." "Right," the guitarist said sarcastically. "It's a horrible situation down there, and it should remain so." What really got his goat was "the bureaucratic arrogance of it all. Rules. Rules. You've got to have rules. How can rules apply to aesthetics?"

The transit authority replied that musicians setting up shop on densely packed platforms posed safety problems. Said a spokesman: "We do not allow any unsanctioned playing of instruments on the subways." Carew-Reid chose to challenge the constitutionality of the authority's rules against his unsanctioned playing. The T.A. dropped all charges against Carew-Reid in January, stopped issuing


"The bureaucratic arrogance of it all. Rules. Rules. You've got to have rules. How can rules apply to aesthetics?"
Guitarist Carew-Reid

summonses to musicians (unless they are found to be blocking an entrance or interfering with train operations—rare instances, both), and said it would rewrite its regulations.

"It was the best possible victory," Carew-Reid says. "I was almost developing a hate-cop mentality. Now I feel pleased when I see one come up. Sometimes they say, 'That was nice.' "

One recent drizzly morning, a lot of people expressed similar sentiments. "God bless you," a woman said in a note she dropped into the musician's guitar case, along with a dollar. "Lovely," said others. "Just beautiful." At the end of the day, the guitarist pockets between $40 and $60, his normal take. Then he returns to the fleabag he calls home, takes up his duties as president of the tenants' association and works for better housing conditions. "This is America, isn't it? People don't have to live in squalor."

A year ago this spring Cat Nguyen was 16, an honors student at West Jefferson High School, just across the Mississippi River from New Orleans, and an editor of a soon-to-be mimeographed school paper called *Your Side*. Five years before that she had reached this country from Viet Nam, with no command of English. Having come so far so quickly, she thought the world was at her feet—until Principal Eldon Orgeron saw the paper and banned it.

He had not been consulted, Orgeron said; what was more, he seemed to read the paper's tone as seditious. Nguyen went to the American Civil Liberties Union. "I had to do it to prove I can fight for my rights and to show other kids they can fight for theirs."

Nguyen is one of those wunderkinds who inspire pride, envy or both. Her mother came from Saigon to New Orleans in 1980 to be near a brother. Cat soon followed. Her mother got a job teaching elementary school and rented a long, skinny house—a shotgun house—hard by the levee in the little town of Gretna. Cat conquered English, became an honors student and grew to a height of 4 ft. 9 in. She also got an after-school job in a grocery, where she has to stand on a case of beer to reach the cash register.

Last year, as part of a class project on freedom of the press, she and her friend Regina Saenz and a couple of casual contributors put out their 14-page mimeographed paper. They thought they were being ironic, funny, irreverent. They included references to unresponsive counselors, the selling of term papers, sex, drugs, cheating. "Don't try to cheat unless you're really sneaky, have years of experience and sit way in the back of the class," they wrote in a parody of an advice column. To a would-be dropout, they preached, "Just stay home, get a job at some gas station, get married, have a couple of kids, and before you know it, you'll be 70."

"This was not responsible journalism," said Orgeron. "This school does not extol those kinds of things. That's why this paper has to stop." The principal seized the last 30 of the 150 copies Cat had run off. She had sold the rest at 50¢ a pop. The young woman likes to tell her own story:

"I used to be a waitress in a restaurant, and I knew some lawyers, and they told me to call the American Civil Liberties Union. For a week they didn't accept me. They thought I was just some student mad at my principal. When they did accept me, the A.C.L.U. contacted the school and threatened to take it to court. The school board's lawyers settled out of court. I got the right to print more issues, but I couldn't sell it. We had no money. How could I print without selling?

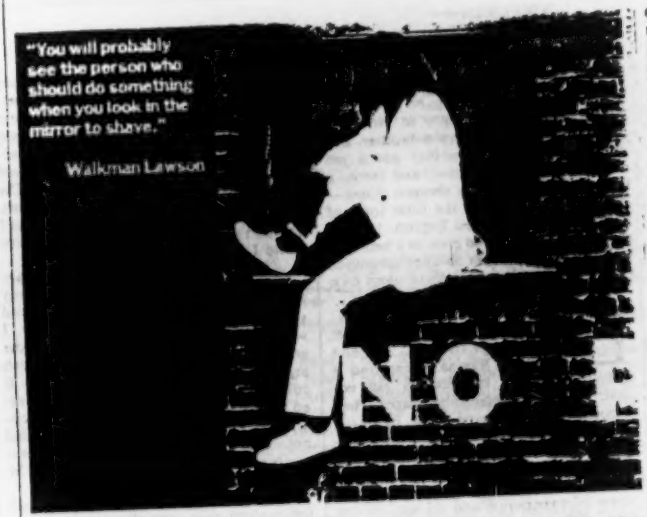
"I could not sue without parental approval because I'm underage, and my mother works for the school board and she wouldn't sign. If I had my way, I would have taken it all the way. At the end of the school year I decided to publish another issue. Since I couldn't sell it, it came mostly out of my pocket. I just wanted to prove my rights. It made the teachers mad. The principal said he decided not to censor it—with the lawyers and everything he didn't have the right—but he just wanted to sound tough."

What dispirited her about the ordeal, the student says, was the apathy of the student body. "I wanted a paper for the majority, the D students. The minority, the A students, have their own paper, the official paper, the *Jolly Roger*. But when my paper came out, the minority was against me and the majority couldn't have cared less. I wanted to be a lawyer and change the world. But when I saw the minority wasn't with you and the majority didn't care, it looked to me just like politics. I have decided to become a doctor and help people whether they want it or not. I don't want to have anything to do with politics."

Cat Nguyen was graduated from

"I had to do it to prove I can fight for my rights and to show other kids they can fight for theirs."

Pupil Nguyen



West Jefferson High last month with perfect scores and a four-year Martin Luther King Scholarship to Brandeis University, where she will start the long road toward becoming a physician.

"The dictum that for every wrong there is a right is not true reality. There are a lot of people out there who have been wounded, with no remedy." This is Ed Lawson talking, and can he talk. It is a stunning San Francisco dawn, and Lawson has rejected an invitation to breakfast. "I do not like to do two pleasurable things at once, converse and eat. I find one gets in the way of the other. We'll find someplace outdoors to languish." In moments he secures a public bench not far from Union Square, and occupies it with a self-assurance that all but says aloud, "I am a taxpayer. This is mine."

Lawson ran into trouble in San Diego, where, as an "avid pedestrian," he was stopped repeatedly for vagrancy on his midnight walks, prosecuted twice and convicted once under a provision of the state's penal code that required him to produce "credible and reliable" identification for any police officer who had reason to be suspicious. Lawson saw the matter simply: he was black, his looks were not conventional, and he was treading white sidewalks. His suit called the law unconstitutionally vague and said it violated the Fourth Amendment's guarantee against "unreasonable searches and seizures" and the Fifth Amendment's self-incrimination protection. The U.S. Supreme Court did not subscribe all the way with Lawson, but it did agree that the statute was too vague to satisfy the due-process clause of the 14th Amendment. Today Ed Lawson's nightly constitutionals are nobody's business.

"I took a terrible beating for years," Lawson says, drinking in the day. "Somewhere back in here is Melvin Belli's office." He sweeps an arm round San Francisco. "I sat there. He said, 'No remedy. No money in it.' I went to the best-known attorneys, the highest priced. They said by and large you don't win against the police department. They didn't understand that I knew I could beat them on my own turf, the media. Most people who can communicate, communicate. Those who can't, carry guns. I thought surely at some point sanity would prevail. But they would not give up, and so it went all the way to the Supreme Court."

In May 1983, the night the Supreme Court struck down the California statute that the San Diego police had used to nail Lawson for vagrancy, Lawson, who was called the California Walkman in headline shorthand, was all over the networks' sunset-up as the news programs had it wherever he pleased. He said at the time, "If you are one of those individuals who over coffee and the morning paper says 'This is terrible. Somebody ought to do something about this,' you will probably see the person who should do something when you look in the mirror to shave."

To this day he keeps his principles handy, as you would a wallet. Born 41 years ago in Buffalo, he remembers blacks tapping in the streets in a time before they were called raps. "They were always saying, 'They won't let me do this.' My frequent comment would be, 'Who are they?' Much of my life has been uncovering that prevailing myth."

Somewhere along the line, Lawson, an odd duck by any measure, got press smart. He knew he was photogenic, he knew he was bright, and he knew his cause was right. Innocent black man arrested for taking a hike? It was a natural. The notoriety his case received has led to his involvement in other "meaningful battles," as he calls them.

Lawson makes a living in an ill-defined sort of way. "I'm neither a butcher, a baker nor a candlestick maker. I do joint ventures with the entertainment industry. I'm a member of the Screen Actors Guild. I wrote a screenplay. I've got a horrendous project involving the integration of entertainment with education. You want to call me a consultant? Will your stomach settle? Okay, I'm a consultant. But really I do whatever the Sam Hill I want to." Lately he has been involved in something called Pro Per Inc., which is "attempting to de-lawyer and repeople the American court system by encouraging Americans to represent themselves in court." And there is something Lawson calls the "Unauthorized Commission on the Bicentennial of the United States Constitution." He is publishing a biweekly pamphlet called *Common Cents*, which encourages the common man to celebrate his favorite part of the Constitution in his own way, as opposed to what Lawson sees as a white, snobbish celebration along the Potomac.

"The measure of an advanced civilization is how it treats its worst people, not its best," he says, rising from his bench. "Those who have the most reason to celebrate a Constitution are the poorest. The people in the BART [Bay Area Rapid Transit] station. That gentleman asleep on that bench over there." Then Lawson strides away, a man with a purpose. —*By Gregory Jaynes*

If many Americans today look to the U.S. Supreme Court as their highest, best hope, it did not start that way. During the court's first term in February 1790, it had a light work load: no litigants, no docket and no decisions. Many lawyers selected as Justices dodged the honor. The ultimate proof of the high court's low status came when the Government moved to Washington in 1800: the court had been forgotten, and lacked even a courtroom. Congress rushed to fill the gap by providing a small committee room in the basement of the Capitol, where the court remained until the Civil War.

Editorial and Op-Ed pages, 14-15
Education Advertising
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The New York Times
THE WEEK IN REVIEW
Section 4
Sunday, July 5, 1987

The Battle Over Bork

Senate Liberals Will Try to Block Nominee On Ideological Grounds

By STUART TAYLOR Jr.

WASHINGTON

WITH the direction of the Supreme Court, the Reagan legacy and the Democratic Presidential nomination all at play, the nomination of Judge Robert H. Bork portends the biggest ideological battle of President Reagan's second term. It will also be the major test of modern times on an issue as old as the Republic: Is the Senate's "advice and consent" role a mandate to reject a Presidential nominee to the Court because it dislikes his ideology?

The recent tradition, which the Administration says is rooted in the Constitution, has been Senate acquiescence on judicial nominees who share the President's philosophy. But liberals say the framers of the Constitution intended the Senate to play a coequal role; otherwise, they maintain, it would be rubber-stamping a President's effort to remake the law of the land — and to roll back constitutional protection of abortion rights — through appointments to the Court.

The liberals are citing experience going back to the debates at the Constitutional Convention and the Senate's rejection in 1795 of John Rutledge, President Washington's nominee to be Chief Justice, largely because of the nominee's opposition to the Jay Treaty with England. In the two centuries following, the Senate has rejected or forced the withdrawal of nearly 20 percent of presidential nominees to the Court.

Recent confirmation battles, even the liberals' attack on Justice William H. Rehnquist's elevation to Chief Justice, have focused on allegations of personal misconduct and veracity. But ideology was one key issue when President Johnson was forced to withdraw his nomination of Justice Abe Fortas to be Chief Justice in 1968. The senators opposing him included Strom Thurmond of South Carolina, now senior Republican on the Judiciary Committee, who took the occasion to filibuster against the liberal jurisprudence of the Warren Court, and Howard H. Baker Jr., now White House Chief of Staff.

Ideology has assumed such prominence in the battle over Judge Bork because his vote and intellectually muscular conservatism seem so likely to tilt the Court sharply to the right on such politically and emotionally charged issues as free speech, affirmative action, religion and, most conspicuously, abortion. In many 5-to-4 decisions on those issues, the man he would replace, the moderate-to-conservative Justice Lewis F. Powell Jr., had voted with the liberals.

Judge Bork's eventual confirmation, even by a Democratic-controlled Senate, seems probable, though not assured. But with Senate [illegible] votes unlikely before the Court's new term begins, the process promises a bitter one of long duration and unpredictable ferocity.

Liberal groups say they are crusading to stop Judge Bork well in their major projects of the Reagan era. They will be pressing senators who are seeking the Presidency, especially Joseph R. Biden Jr., who as Judiciary Committee chairman will run the hearings.

President Reagan and his supporters on the right will push him with equal passion. The Bork nomination represents a last, best chance to advance Mr. Reagan's conservative agenda.

Genial and Tough

At the center of the storm stands a big, bearded, genial man, long a prominent critic of the "judicial imperialism" he ascribes to the "modern, activist, liberal Supreme Court." Most conservatively, Judge Bork has denounced the 1973 decision identifying a constitutional right to abortion, and it seems clear he would provide the fifth vote to narrow, and perhaps overrule, that decision.

Liberal as well as conservative friends and associates praise Judge Bork as a deep thinker whose hard-edged theories are devoid of bigotry and tempered by a cheeky wit, who can enjoy a martini or a friendly debate with strong ideological adversaries. He won the American Bar Association's highest rating when nominated for the United States Court of Appeals for the District of Columbia, and the hunt for clouds on his integrity has been unavailing.

To his chagrin, the 60-year-old former Yale law professor has been known to the public chiefly as the Acting Attorney General who followed President Nixon's order to dismiss Archibald Cox as the first Watergate special prosecutor in the 1973 "Saturday Night Massacre." While opponents have deplored his role in that episode, some key participants say he acted honorably. Bork supporters question why the Senate should be any more troubled now than it was when it confirmed him unanimously in 1982.

His writings, both as a scholar and as a judge clearly put him very far to the right on the spectrum of [illegible] legal views today if Judge Bork had been in charge over the last few decades. He has dissented, for example, the "one person, one vote" rulings of the 1960's and decisions striking down poll taxes and promoting the advocacy of overthrowing the government.

While public controversy has centered on Judge Bork's denunciations of the abortion decisions, his position on that issue is far closer to the mainstream of legal scholarship than some of his other views. He is notorious for what he terms "deference to democratic choice": his view that the judiciary should not overrule the social policy choices of elected officials by "removing" rights with no specific basis in the Constitution's language.

It is a measure of how deeply the mechanism of judicial review has taken root in America that elected senators are feeling so much pressure to reject a nominee whose philosophy rests on the premise that legislation

Judge Robert H. Bork

"He'll have a tough time getting confirmed, but he is stunningly smart."
Howard H. Baker Jr.
White House Chief of Staff

"Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids. . . ."
Senator Edward M. Kennedy
Democrat of Massachusetts

"I think he would be an outstanding member of the Court. Bork deserves a lot of credit for standing up to Nixon and telling him to appoint another special prosecutor."
Elliot L. Richardson
Former Attorney General

"The Court should not be a pendulum that swings back and forth depending on the ideology of the President."
Senator Paul Simon
Democrat of Illinois

"When you have a man of this caliber, I think it's just terrible to try and make an ideological battle out of it."
Senator Orrin G. Hatch

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Doing a turnabout on the nomination of Judge Bork

y David K. Boldt
Staff of the Editorial Page

This is confession of a convert. Until a week ago I favored the confirmation of Judge Robert H. Bork to be a justice of the U.S. Supreme Court.

I now oppose it.

I have a number of reasons why I would like to explain my own conversion. One is a desire to underscore the fact that the editorial we wrote last Sunday calling on the Senate to reject the nomination of Bork was not an autonomic, reflex reaction. My case in his favor was made vigorously during dozens of lengthy discussions on the issue. I was not his lone adherent. The consensus that eventually emerged was reached slowly — and somewhat painfully.

Truth to tell, one of the reasons I liked Bork was that I disliked the tactics of some of the organizations arrayed against him. Those enemies included many of the usual collection of screaming meemies of the left, who came scurrying out of the woodwork with accusations and arguments that skittered along the surface of issues that needed to be considered at much deeper levels.

Sen. Edward M. Kennedy (D., Mass.) showed a particularly demagogic inclination to cannonball off the deep end with allegations that in Robert Bork's America "... 'rogue' police could knock down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, [and] writers and artists could be censored at the whim of the government ...." (Kennedy's style of questioning in the hearings was also offensive to me. He often seemed to be more interested in combatively waggling his corpuk at jowls at Bork, rather than in listening to what the nominee had to say for himself.)

The tendency of Bork's critics to seize on the *Griswold v. Connecticut* case also grated. That's the one where Bork, to hear some people tell it, would have allowed police in Connecticut to break into people's bedrooms at night to check on whether contraceptives were in use.

It just so happened that as a result of having been a clerk for the Professional Pharmacy in South Norwalk, Conn., while the law was in effect, I knew that contraceptives were widely and easily available in Connecticut, that the law against them was never enforced, and was, in fact, unenforceable. The litigation over it was just one of those games lawyers play. And Bork, in any event, never said he supported the law. All he said was that if the Connecticut legislature was stupid enough to pass such a law, the courts lacked a clear basis on which to overturn it.

But my support of Bork was broader than that. I thought he was right about antitrust laws being inappropriately applied. I thought he was absolutely on target about the chilling effect libel cases against publications were having on the quality of public debate in America. I agreed with his belief that a search should be made for a way by which pornography could be taken out from under the protection of the First Amendment.

Bork's criticisms of *Roe v. Wade*, the case that permitted abortion on demand, likewise seemed to have validity. There is probably no way to balance precisely the rights of a pregnant woman against the rights of a potential human being existing within her. The case is an example of the legal aphorism that "hard cases make bad law."

Moreover, the chance that the Supreme Court, with or without Bork, will reverse the decision seems exceedingly remote. Even if it did, surely legislatures would legalize abortion, given the preponderance of public opinion in support of it. (After all, abortion was already legal in 14 states before *Roe v. Wade* was decided.)

Beyond the specific cases, I was not uncomfortable with the idea that the Supreme Court, after more than a quarter century of liberal activism, perhaps ought to go through a period of conservative restraint. The pendulum-like movement of our major institutions has been important in preserving the tendency toward moderation that has been the saving grace of American democracy.

So where, and why, did I switch directions on Bork? There was no epiphany; no single moment. Rather, it was an agglomeration of moments. For starters, I had always been uncomfortable about Bork's opposition to the laws that prohibited racial segregation in public accommodations. Yes, he'd recanted. And true, his thoughts were in a magazine article where his purpose was clearly to illuminate an issue by being inflammatory.

But this was not just any issue. It was perhaps the most important continuing issue in American history. The choice between right and wrong, even in the context of the times, should not have been opaque to someone of his intelligence and background. And he had been wrong.

Then, one by one, there came to light these instances in which Bork had sought out ways in his reasoning to restrict the rights of individuals and groups. The issues included racial covenants in deeds, poll taxes, the rights of women to the equal protection of the law under the 14th Amendment, the sterilization of violent felons. In some instances, Bork had changed his mind. In others, his argument for his position in a specific instance was defensible, even convincing.

But there was a cumulative effect. Here seemed to be a man who calculated legal balances without realizing the way in which the outcome affects human beings. An acquaintance who is a lawyer expressed it perhaps a little harshly in saying that Bork appeared to be a judge who "has no soul."

Maybe the balance shifted when Bork, at the close of his testimony, was asked why he wanted to be on the Supreme Court, and replied, basically, that he was looking forward to the "intellectual feast" of grappling with issues.

But he didn't say certain other things. He didn't, to be specific, talk about the court's role in protecting the rights of Americans. And I don't want a judge determining the balance of the Supreme Court who doesn't immediately list among his priorities the preservation of liberty and justice for all.

The Philadelphia Inquirer
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THE NEW YORK TIMES, SUNDAY, JULY 26, 1987

Law vs. Principle: Out of Watergate Comes New View of Bork

By KENNETH B. NOBLE
Special to The New York Times

WASHINGTON, July 25 — Fourteen years after the immense drama of what many at the time called a "Saturday Night Massacre," the handling of that constitutional crisis amid the Watergate scandals is emerging as an issue that could shape the emotional constitutional questions of today.

That is because the man in the middle on the night of Oct. 20, 1973, Robert H. Bork, is now President Reagan's nominee to fill a critical swing seat on the Supreme Court. Whoever fills that seat may have the power to change national policy on issues ranging from race relations to abortion.

As the Senate ponders the way Judge Bork handled that earlier role, among other issues in the confirmation battle to come, it is likely to find that his consuming interest was not protecting President Nixon's weakening grip on office, as some foes charged immediately, or protecting the Justice Department from chaos, as he has suggested, nor any of the larger issues of the day. Instead, Judge Bork was apprently preoccupied with a point of law: whether Archibald Cox, who as Watergate special prosecutor was ostensibly a Justice Department official, had a legal right to mount a court challenge against the President; and whether the President had the legal authority to dismiss him for doing so.

Underlying the struggle were fundamental questions of governance: Did the special prosecutor have the right to subpoena the President's secret tapes? Did the special prosecutor have authority to challenge a President? Would Elliot L. Richardson, whose own confirmation as Attorney General was achieved by the promise to appoint Mr. Cox, discharge his old law professor at Mr. Nixon's urging? If he would not, would someone else? And finally, was Mr. Nixon trying to hide his complicity in the coverup of the break-in to Democratic National Committee headquarters by burglars linked to the White House?

Mr. Richardson and his deputy, William D. Ruckelshaus, refused to obey White House orders, and quit or were fired. Mr. Bork, who had begun that fateful Saturday as Solicitor General, the third-ranking officer in the Justice Department, went along.

Judge Bork has said he dismissed Mr. Cox in order to hold the Justice Department together by sparing it from a long succession of resignations and to continue the Watergate investigation at a time when the alternative may have been chaos.

But what other participants in the episode remember about Mr. Bork's performance is what they describe as his single-minded, almost obsessive concern about an issue of legal procedure, rather than the substance of Mr. Cox's investigation of the President.

Character Flaws Seen In Legalistic Outlook

Memories of the affair have faded somewhat since that night, but Judge Bork's critics maintain that this episode reveals character flaws that go beyond their objections to his views on specific issues.

It is what they allege is a narrowness of vision and reverence for executive authority, as much as his dismissal of Mr. Cox, that these critics say makes him unsuitable for the Supreme Court.

But Judge Bork's defenders, including some who believe he should not have fired Mr. Cox, dispute this view.

Philip A. Lacovara, a Washington lawyer who was counsel to Mr. Cox, said Mr. Bork based his decision to follow the President's orders on an honest assessment of the legal issues.

"He made a choice that was within the range of reason, even though in my view it was not the correct choice," Mr. Lacovara said. "But it was not one that reflected evil motives or a fundamental misunderstanding of constitutional law."

A series of interviews with people involved in the "massacre" has offered new insights in Judge Bork's legal philosophy and approach to the law during this tense period, an approach that his colleges at the Justice Department believe were shaped largely by the views of his mentor at Yale University, Alexander M. Bickel. Indeed, both critics and supporters of the Bork nomination see some irony in so much turning on 24 hours in the life of a man who is now 60 years old.

The episode began on Oct. 19, 1973, the Friday before the dismissal of Mr. Cox. Mr. Nixon had refused to accept the order by a Federal appeals court to surrender nine tape recordings of conversations in the White House. Some of the tapes were found to have substantially corroborated allegations that the President participated in a coverup of the break-in that took place two years earlier at the headquarters of the Democratic National Committee in the Watergate complex here.

Life Goes On As the Crisis Looms

That night, recalls Ralph K. Winter, a Federal appellate judge then a Yale Law School professor, who was visiting Mr. Bork and his wife in Washington, the Solicitor General was on the phone several times with Mr. Richardson, but "clearly, there was no talk of resignation or impending crisis."

Saturday morning, Mr. Winter flew to Hot Springs, Va., to give a speech, while his late wife, Claire, and their children went to the Zoo. Mr. Bork, he recalls, said he was going to the office for a while, and then planned to watch a Penn State football game on television.

Meanwhile, Mr. Richardson was making a final attempt at a compromise between the President and the special prosecutor that would accomodate Mr. Cox's need for additional White House materials.

But there was no middle ground left. At 1 P.M., Mr. Cox appeared at a nationally televised news conference at the National Press Club to defy the President openly. He said he intended to "go about my duties on the terms of which I assumed them." One of those duties, he said, would be "to bring to the court's attention what seems to me to be noncompliance with the court's orders."

Back at the Justice Department, Mr. Richardson and Mr. Ruckelshaus watched Mr. Cox's performance, and concluded that it would probably mean that the White House would insist on dismissing him for insubordination.

"It had been been clear in my mind for a couple of days that I wouldn't do it," Mr. Ruckelshaus said last week of dismissing Mr. Cox, "And when it became clear to both Elliot and me that the President was going forward with his determination to fire Cox, we both sort of simultaneously said, 'Who's next?'" And it was clear than that Bork was the next in line"

As they feared, at 2:20 P.M., Alexander M. Haig Jr., then the White House chief of staff, called Mr. Richardson and told him to "fire Cox." The Attorney General refused and asked to see the President. While the Attorney General waited for a summons to the White House, he discussed the remaining options with Mr. Ruckelshaus and Mr. Bork.

Matters of Principle Vs. Questions of Law

"My recollection," Mr. Ruckelshaus said, is that Mr. Bork "ultimately decided that the President had the power to fire Cox, and he had the right to ask him to be the instrument of that power. He had no personal scruples against firing Cox."

An important element in Mr. Bork's decision, Mr. Ruckelshaus added, may have been his ignorance of important details of the tapes dispute.

"He didn't have any of that information, he didn't have any of the flavor, the feel of what had been building up over several months, so his perception of what he was being asked to do was much different from mine and Elliot's," Mr. Ruckelshaus said.

But even though Judge Bork had been largely removed from the unfolding events, his views on the role of the special prosecutor were well known within the Justice Department, according to several officials. Indeed, an important strain of Judge Bork's views for many years had been his strong sense of deference to authority, in particular Presidential authority.

"What is most striking to me about Judge Bork is that he is an advocate of disproportionate powers for the executive branch of Government, almost executive supremecy. And his handling of

United Press International

Robert H. Bork leaving the Justice Department Oct. 20, 1973, after being appointed Acting Attorney General by President Nixon.

Watergate seems to fits that pattern," said William L. Taylor, a Washington law and a official at the Leadership Conference on Civil Rights, an advocacy group that is opposed to Mr. Bork's nomination.

The deference to the President included a distaste for the notion that a special prosecutor — a member of the executive branch — could operate outside Presidential authority, Judge Bork's former associates said.

"Bork had a genuine intellectual objection to this whole arrangement, and this really offended his view of the way things ought to be," said Richard K. Darman, a former Reagan Administration official who was a senior aide to Mr. Richardson.

Mr. Richardson agreed: "I think that as a matter of principle, Cox should not have been fired," he said. He said he "never thought of it as a legal question," as Judge Bork apparently did.

The Role of a Mentor: Writings of Bickel

Mr. Richardson said he felt that while no one doubted Mr. Cox was "acting consistent with his charter," the special prosecutor was also "refusing to carry out instructions."

"I thought Bork was simply taking the position that the President was entitled to have him fired for that reason," Mr. Richardson said.

Judge Bork's views of the role of the special prosecutor in investigating the President were hardly novel, and in fact, had been widely discussed in legal and academic circles through the writings of the late Professor Bickel of the Yale Law School, one of the nation's foremost constitutional scholars.

In September, a month before the "massacre," Professor Bickel, a whom Mr. Bork has described as his best friend, wrote an article for The New Republic called "The Tapes, Cox, Nixon." In it, he argued that that the courts should not be called upon to take sides in the dispute between Mr. Cox and the President.

"Mr. Cox has no constitutional or otherwise legal existence except as he is a creature of the Attorney General, who is a creature of the President," Professor Bickel wrote. "To the extent, therefore, that the President's adversary is Mr. Cox, the President is litigating with himself. He is suing himself and defending himself against himself."

Thus in Professor Bickel's view, the President could order Mr. Cox to desist from his demands at any time, and re-

Archibald Cox, the Watergate special prosecutor, at news conference the day he was ousted.

move him if he refused.

The article, which became known as the "bucket option," was widely read in the White House and the Justice Department, and added fuel to speculation that Mr. Cox would be fired.

Distasteful Assignment In a Highly Sought Job

Still, according to Mr. Ruckelshaus, Judge Bork "was not very happy to be confronted with that choice."

At 3:20 P.M., Mr. Haig called Bork and told the Attorney General to "come over." Mr. Richardson tendered his resignation.

About an hour later, Mr. Richardson returned to his office where several of his aides had gathered. A secretary said Mr. Haig was calling for Mr. Ruckelshaus, and the Deputy Attorney General took the private elevator down to his office on the floor below to take the call.

Mr. Haig said the President wanted him to fire the special prosecutor. "I thought what the President was doing was fundamentally wrong," Mr. Ruckelshaus recalled. "I was convinced that Cox had only been doing what he had the authority to do; what was really of concern to the President and the White House was that he was too close. He hadn't engaged in any extraordinary improprieties, quite the contrary."

Mr. Ruckelshaus wrote out a letter of resignation, but the White House did not wait to receive it before announcing that he had been dismissed.

Upstairs, that left Judge Bork the acting Attorney General. He pondered the order he was about to receive and considered resigning.

"I was thinking of resigning not out of moral considerations," Judge Bork said in an interview later that year, "I did not want to be perceived as a man who did the President's bidding to save my job."

Mr. Richardson and Mr. Ruckelshaus, concerned about the continuity of their department, both urged him not to leave.

"We thought his leadership of the department was going to be critically important in a situation of enormous stress," Mr. Richardson said. "And we were genuinely alarmed by the possibility that if Ruckelshaus's resignation and my resignation was followed by a chain reaction, we could end up with the chief of the messenger service as acting Attorney General."

Firing Ruled Illegal After the Fact

Judge Bork went down in the elevator to Mr. Ruckelshaus's office and spoke on the telephone to Mr. Haig, who said he was sending a White House limousine for him.

At the White House, after being designated acting Attorney General, Judge Bork sent Mr. Cox a two-paragraph letter of dismissal.

When Judge Bork returned home later that night, Mr. Winter recalled, his mood was gloomy. "He was fully aware of the controversy about to ensue," Mr. Winter said..

"In fact, a member of his staff called to congratulate him on becoming acting Attorney General. And I recall Bob wryly telling the staff member that he did not think, under the circumstances, congratulations were in order," Mr. Winter said.

Indeed, news that Judge Bork had dismissed Mr. Cox on the President's orders ignited a storm of criticism. In the next 10 days, more than 300,000 telegrams were received by Congress and the White House, most calling for Mr. Nixon's resignation.

The outcry was so sustained and fierce that the following Monday, the White House announced that it had decided, after all, to turn over the tapes to the new special prosecutor.

For his part, Judge Bork has insisted that he made the right decision in firing Mr. Cox.

"The President and Mr. Cox had gotten themselves, without my aid, into a position of confrontation," Judge Bork has said. "There was never any question that Mr. Cox, one way or another, was going to be discharged. At that point you would have had massive resignations from the top levels of Justice.

"If that had happened," Judge Bork continued, "The Department of Justice would have lost its top leadership, all of it, and would I think have effectively been crippled."

Judge Bork's dismissal of the special prosecutor was challenged in a suit filed by Ralph Nader, the consumer advocate, among others. On Nov. 14, 1973, Federal Judge Gerhard A. Gesell of the Federal District Court for the District of Columbia ruled that the firing of Mr. Cox, in the absence of a finding of extraordinary impropriety as specified in the regulation establishing the special prosecutor's office, was illegal.

The Justice Department did not appeal the ruling, and because Mr. Cox indicated that he did not want his job back, the issue was considered moot.

TESTIMONY

BEFORE

THE SENATE JUDICIARY COMMITTEE

ON

THE NOMINATION OF JUDGE ROBERT H. BORK

TO THE UNITED STATES SUPREME COURT

JEROME A. STRONG

DEPUTY DIRECTOR

MICHIGAN DEPARTMENT OF CIVIL RIGHTS

MR. CHAIRMAN, HONORABLE MEMBERS OF THE COMMITTEE. MY NAME IS JEROME A. STRONG AND I AM DEPUTY DIRECTOR OF THE MICHIGAN DEPARTMENT OF CIVIL RIGHTS.

ON BEHALF OF DOROTHY HAENER, CHAIR OF THE MICHIGAN CIVIL RIGHTS COMMISSION, AND JOHN ROY CASTILLO, DIRECTOR OF THE MICHIGAN DEPARTMENT OF CIVIL RIGHTS, I WOULD LIKE TO THANK YOU FOR THIS OPPORTUNITY TO APPEAR BEFORE YOU TODAY AND VOICE MY OPPOSITION TO THE NOMINATION OF ROBERT H. BORK TO THE UNITED STATES SUPREME COURT.

THE MICHIGAN CIVIL RIGHTS COMMISSION, ESTABLISHED BY STATE CONSTITUTION IN 1963 IS MANDATED TO -- "INVESTIGATE ALLEGED DISCRIMINATION AGAINST ANY PERSON BECAUSE OF RELIGION, RACE, COLOR OR NATIONAL ORIGIN IN THE ENJOYMENT OF THE CIVIL RIGHTS GUARANTEED BY LAW AND BY THIS CONSTITUTION, AND TO SECURE THE EQUAL PROTECTION OF SUCH CIVIL RIGHTS WITHOUT SUCH DISCRIMINATION.

IN ORDER TO ACCOMPLISH THIS MANDATE, THE DEPARTMENT WAS ESTABLISHED TO ENFORCE TWO STATE LAWS ENACTED IN 1976, THE ELLIOTT-LARSEN CIVIL RIGHTS ACT AND THE MICHIGAN HANDICAPPERS CIVIL RIGHTS ACT. WE HAVE A STAFF OF 230 AND A BUDGET OF $12 MILLION. WE PROCESS YEARLY OVER 6,000 COMPLAINTS OF DISCRIMINATION RANGING FROM RACE, SEX, AGE, HANDICAP, RELIGION AND NATIONAL ORIGIN. WE BELIEVE THESE ARE DISCRIMINATION CASES THAT MAY BE IN JEOPARDY SHOULD ROBERT BORK BE APPOINTED TO THE SUPREME COURT.

FOR EXAMPLE, IN MONOGRAPH "MUTUAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS" PUBLISHED IN THE INDIANA LAW JOURNAL FALL OF 1971, THEN YALE LAW PROFESSOR ROBERT BORK STATED "THE EQUAL PROTECTION CLAUSE HAS TWO LEGITIMATE MEANINGS. IT CAN REQUIRE FORMAL PROCEDURAL EQUALITY, AND, BECAUSE OF ITS HISTORICAL ORIGINS, IT DOES REQUIRE THAT GOVERNMENT NOT DISCRIMINATE ALONG RACIAL LINES. BUT MUCH MORE THAN THAT CANNOT BE READ INTO THE CLAUSE."

PROFESSOR BORK WENT A STEP FURTHER, IN THE SAME ARTICLE AND CONCLUDED "THE BASE CONCEPT OF EQUALITY PROVIDES NO GUIDE FOR COURTS. ALL LAW DISCRIMINATES AND THEREBY CREATES INEQUALITY. THE SUPREME COURT HAS NO PRINCIPLED WAY OF SAYING WHICH NON-RACIAL INEQUALITIES ARE IMPERMISSIBLE."

GIVEN THIS I URGE YOU MR. CHAIRMAN AND COMMITTEE MEMBERS, AS YOU DELIBERATE ON JUDGE BORK'S NOMINATION PLEASE ASCERTAIN FROM HIS TESTIMONY FOR YOURSELVES IF THIS IS STILL HIS BELIEF. FOR AS YOU KNOW, UNDER THIS THEORY THE HANDICAPPERS, SENIORS, AND WOMEN OF YOUR STATES COULD BE IN FOR AN EVEN LONGER WAIT FOR TRUE EQUALITY.

MY GOVERNOR, JAMES J. BLANCHARD, A FORMER COLLEAGUE OF YOURS IN THE HOUSE, STATED IN HIS 1987 STATE OF THE STATE ADDRESS THAT "AS MICHIGAN APPROACHES THE 21ST CENTURY, WE MUST ALL WORK TOGETHER TO CONTINUE TO ENSURE THAT ALL OF MICHIGAN'S CITIZENS ARE PROVIDED WITH EQUAL ACCESS TO EDUCATION AND JOBS."

AND, MR. CHAIRMAN GOVERNOR BLANCHARD PUT THE FUNDS THERE TO ASSIST US IN OUR MANDATE AND HIS DESIRE FOR EQUALITY BY INCREASING THE DEPARTMENT OF CIVIL RIGHTS BUDGET AND STAFF LEVELS. MAY I ADD THIS IS OUR FIRST INCREASE SINCE 1979.

THE AMERICAN PROMISE IS OPPORTUNITY -- THE CHANCE FOR ALL PERSONS, REGARDLESS OF RACE, SEX, ORIGIN, OR HANDICAP TO ACHIEVE HER OR HIS FULL POTENTIAL.

SINCE 1983 WHEN GOVERNOR BLANCHARD TOOK OFFICE MICHIGAN HAS ATTEMPTED TO HELP FULFILL THAT PROMISE AND NOT WITH HELP FROM THE FEDERAL LEVEL, I MUST ADD. POLICY STATEMENTS, PROGRAMS AND LEGAL BRIEFS BY THE JUSTICE DEPARTMENT AND THE UNITED STATES CIVIL RIGHTS COMMISSION PLUS BUDGET CUTS TO EEOC THREATEN THE GAINS MADE IN THE FIGHT FOR EQUALITY.

MR. CHAIRMAN MINORITIES, WOMEN, THE POOR HAVE ALL BENEFITED BY THE LAWS YOU AND YOUR COLLEAGUES HAVE ENACTED AND BY THE FAVORABLE DECISIONS OF THE SUPREME COURT. POLL TAXES, LITERACY TESTS, AS YOU WELL KNOW, HAVE ALL BEEN USED AS A MEANS TO KEEP BLACKS, BROWNS AND POOR WHITES FROM PARTICIPATING IN THE ELECTORAL PROCESS. THIS HAS BEEN DOCUMENTED. YET THE PRESIDENT'S NOMINEE, ROBERT BORK, DURING HIS CONFIRMATION HEARINGS FOR THE SOLICITER GENERAL POSITION IN THE NIXON ADMINISTRATION CRITICIZED THE 1966 SUPREME COURT DECISION

BARRING POLL TAXES. HE STATED "THERE IS NO EVIDENCE.....OF RACIAL DISCRIMINATION IN THE USE OF POLL TAXES."

AGAIN, MR. CHAIRMAN AND MEMBERS, I STRONGLY URGE YOU TO THINK OF THESE FEELINGS IN YOUR DELIBERATIONS.

WELFARE REFORM HAS BECOME THE TOPIC OF THE DAY FROM THE FEDERAL LEVEL TO THE STATE LEVEL -- AND RIGHTFULLY SO. IT IS A DISGRACE IN THIS LAND OF PLENTY FOR ABLED BODIED MEN AND WOMEN TO RECEIVE ASSISTANCE AND NOT BE PROVIDED THE OPPORTUNITY TO WORK. IT IS AN OUTRAGE THAT THOSE CAUGHT IN THIS WEB CALLED WELFARE, WHICH ENTRAPS SO MANY OF OUR FELLOW AMERICANS AND IS BEING FAULTED FOR SO MANY OF THE ILLS IN SOCIETY TODAY.

I THINK WE CAN ALL AGREE THAT THE LAWS ENACTED BY CONGRESS HAS ENABLED A FEW TO ESCAPE THIS WEB AND BECOME FULL PARTICIPATING CITIZENS.

ANOTHER MONOGRAPH APPEARED IN THE 1979 THE WASHINGTON UNIVERSITY LAW QUARTERLY, BY FRANK I. MICHELMAN ENTITLED "WELFARE RIGHTS IN A CONSTITUTIONAL DEMOCRACY." JUDGE BORK CRITIQUED THE ARTICLE STATING "THE PREMISE THAT THE POOR AND BLACKS ARE UNDERREPRESENTED POLITICALLY IS QUITE DUBIOUS. IN THE PAST TWO DECADES, WE HAVE WITNESSED AN EXPLOSION OF WELFARE LEGISLATION, MASSIVE INCOME REDISTRIBUTION AND CIVIL RIGHTS LAWS OF ALL KINDS. THE POOR AND THE MINORITIES HAVE HAD ACCESS TO THE POLITICAL PROCESS AND HAVE DONE VERY WELL

THROUGH IT..."

MR. CHAIRMAN AND MEMBERS. YOU KNOW BETTER THAN ANY THAT THIS IS NOT THE CASE. FOR EXAMPLE, YOUR AUGUST BODY DOES NOT HAVE A BLACK AMERICAN OR HISPANIC COLLEAGUE AND ONLY TWO MEMBERS FROM THE SEX THAT COMPRISES OVER FIFTY PERCENT OF THE POPULATION OF THIS GREAT NATION. IS THIS DOING WELL IN THE POLITICAL PROCESS?

DOES JUDGE BORK STILL FEEL EVERYONE IS DOING FINE THROUGH THE POLITICAL PROCESS?

DOES HE STILL FEEL, AND I QUOTE, "EQUALITY IS NOT THE ONLY VALUE IN SOCIETY: WE MUST BALANCE DEGREES OF IT AGAINST OTHER VALUES. THAT BALANCE IS PREDOMINATELY A MATTER FOR THE POLITICAL PROCESS, NOT FOR THE COURTS.

ALEXANDER HAMILTON, IN FEDERALIST #78, STATED: "THE INTERPRETATION OF THE LAW IS THE PROPER AND PECULIAR PROVIDENCE OF THE COURTS. A CONSTITUTION IS, IN FACT, AND MUST BE REGARDED BY THE JUDGES AS A FUNDAMENTAL LAW. IT THEREFORE BELONGS TO THEM TO ASCERTAIN ITS" MEANING, AS WELL AS THE MEANING OF ANY PARTICULAR ACT PROCEEDING FROM THE LEGISLATIVE BODY."

I GLADLY ACCEPT THIS FROM ONE OF THE FOUNDING FATHERS OF THIS GREAT REPUBLIC. DOES ROBERT BORK ACCEPT THIS CONCEPT? ON MAY 3, 1907, CHIEF JUSTICE CHARLES EVANS HUGHES STATED, "WE ARE UNDER A CONSTITUTION, BUT THE CONSTITUTION

IS WHAT THE JUDGES SAY IT IS. AND THE JUDICIARY IS THE SAFEGUARD OF OUR LIBERTY AND OUR PROPERTY UNDER THE CONSTITUTION."

THIS I ALSO ACCEPT. FOR WITHOUT THIS BELIEF ON THE COURT, WOULD BROWN V BOARD OF EDUCATION HAVE OVERTURNED THE DOCTRINE OF "SEPARATE BUT EQUAL"? WOULD ROE V WADE HAVE ALLOWED WOMEN THE FREEDOM OF CHOICE? I THINK NOT.

JUSTICE HUGO BLACK VIEWED OF THE BILL OF RIGHTS AS "AN AFFIRMATIVE DIRECTIVE TO THE JUDICIARY TO SCAN THE SPECTRUM OF SOCIAL BEHAVIOR FOR ABERATIONS FROM THE CONSTITUTIONAL ORDER." A CONCERN FOR THE INDIVIDUAL IN AN INCREASINGLY IMPERSONAL CORPORATE SOCIETY WAS THE DOMINANT ELEMENT IN THE JURISPRUDENCE OF JUSTICE BLACK.

ON FEBRUARY 17, 1960, JUSTICE BLACK STATED "...I BELIEVE THAT OUR CONSTITUTION WITH ITS ABSOLUTE GUARANTEES OF INDIVIDUAL RIGHTS, IS THE BEST HOPE FOR THE ASPIRATIONS OF FREEDOM WHICH MEN SHARE EVERYWHERE."

I SHARE THAT DESIRE AS SHOULD EACH AND EVERYONE OF OUR FELLOW AMERICANS.

JUDGE BORK PROFESSES A BELIEF IN THE COURTS' UTILIZATION OF "ORIGINAL INTENT". YET IN 1971, IN AN INDIANA LAW JOURNAL ARTICLE, HE STATED "THE COURT CANNOT CONCEIVABLY KNOW HOW THESE LONG-DEAD MEN WOULD HAVE RESOLVED THESE ISSUES HAD THEY CONSIDERED, DEBATED AND VOTED ON EACH OF THEM."

ONCE AGAIN, MR. CHAIRMAN AND MEMBERS OF THIS COMMITTEE, I URGE YOU TO

STUDY ROBERT BORK'S POSITIONS ON THESE ISSUES AND WEIGH THEM VERY CAREFULLY.

FROM THE FALL, 1971, INDIANA LAW JOURNAL, JUDGE BORK ON THE SUBJECT OF FREEDOM OF SPEECH STATED "CONSTITUTIONAL PROTECTION SHOULD BE ACCORDED ONLY TO SPEECH THAT IS EXPLICITLY POLITICAL. THERE IS NO BASIS FOR JUDICIAL INTERVENTION TO PROTECT ANY OTHER FORM OF EXPRESSION, BE IT SCIENTIFIC, LITERARY, OR THAT VARIETY OF EXPRESSION WE CALL OBSCENE OR PORNOGRAPHIC."

MR. CHAIRMAN, HONORABLE MEMBERS, I WILL CLOSE BY SAYING, AFFIRMING A NOMINEE FROM THE "ORIGINAL INTENT" SCHOOL OF THOUGHT IS NOT WHAT YOUR CONSTITUENTS, THE AMERICAN PEOPLE, WANT. I DO NOT THINK THEY WANT TO RETREAT TO THE RELATIVELY SMALL ROLE OF UNCOVERING AND ENFORCING THE NARROW MEANING OF THE CONSTITUTION.

AND, IN RESPONSE TO ATTORNEY GENERAL MEESE IN A DOCUMENT ENTITLED, "ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK", ASSISTANT ATTORNEY GENERAL STEPHEN J. MARKHAM STATED "WE THE PEOPLE" HAVE ERADICATED MANY INJUSTICES OF THE PAST THROUGH CONSTITUTIONAL AMENDMENTS AND SUBSEQUENT LEGISLATION, AS MANY OF THE FOUNDERS HOPED WE WOULD. THESE AVENUES REMAIN AVAILABLE SHOULD WE DESIRE TO CHANGE OUR POLITICAL STRUCTURE IN OTHER WAYS." WITH THE HISTORY OF FAILURE EXPERIENCED BY THE EQUAL RIGHTS AMENDMENT I DON'T WANT TO RELIEVE THE COURT OF CONSTITUTIONAL ACTIVISM.

A ROBERT BORK RESPONSE IS EVEN CLEARER -- "FEDERAL COURTS ARE PARTICULARLY INCOMPETENT TO RESOLVE THE COMPLEX ISSUES OF SOCIAL POLICY. THEY HAVE REACHED OUT TO DECIDE IN THE NAME OF INTERPRETING THE CONSTITUTION."

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE. THESE FEDERAL JUDICIARY APPOINTMENTS ARE FOR LIFE. THEY DO NOT COME BACK TO "WE THE PEOPLE" FOR REELECTION. THEY ARE THERE FOR OUR LIFETIME AND FOR THE LIFETIME OF OUR CHILDREN.

THE MICHIGAN CIVIL RIGHTS COMMISSION AND THE MICHIGAN DEPARTMENT OF CIVIL RIGHTS WOULD LIKE JUSTICES TO BE RESPONSIBLE ENOUGH TO DISCERN THE POPULAR WILL WITH A BROAD DEEP KNOWLEDGE AND EXPERIENCE TO BEAR ON SOCIAL POLICY ISSUES.

I WILL CLOSE MY TESTIMONY WITH A FINAL PLEA THAT YOU NOT CONSENT ON THE APPOINTMENT OF ROBERT H. BORK TO THE SUPREME COURT. THE HOPES AND DREAMS OF MANY AMERICANS REST ON YOUR DECISION.

AGAIN, THANK YOU FOR THE OPPORTUNITY TO TESTIFY.

SUFFOLK UNIVERSITY LAW SCHOOL — BEACON HILL — BOSTON, MASSACHUSETTS 02114

OFFICE OF FACULTY (617) 573-8100

REPORT ON THE "JUDGE BORK SURVEY" OF CONSTITUTIONAL LAW PROFESSORS

October 5, 1987

For further information contact:
Professor Eric Blumenson
Suffolk Law School
56 Temple Street
Boston, MA 02114
(617) 573-8100 / (617) 492-7889

Note: Late responses will continue to be tabulated and updated figures will be available at the above number.

The "Judge Bork Survey" was designed to enable constitutional scholars to voice their opinions on both Judge Bork's qualifications and the constitutional role of the Senate in the appointment process. The questions below were submitted by mail to all constitutional law professors, as listed in the Association of American Law Schools 1986-7 directory of accredited law schools, during the period Sept. 15 through Sept. 22. Responses were received from Sept. 21 though today (after Judge Bork's testimony).

The responses are tabulated below. In brief, the survey indicates:

(1) Constitutional law professors responding almost unanimously believe that it is constitutionally proper for the Senate to consider the nominee's judicial philosophy;

(2) Almost three times as many respondants believe that the Senate should reject Judge Bork's nomination as favor confirmation.

(3) There is no significant difference in opinion between Southern respondants and those in the rest of the country.

(4) Respondants were asked whether certain terms generally described Judge Bork's judicial philosophy. Over four times as many respondants describe Judge Bork as "extremist" than describe him as "mainstream".

The survey results through Oct. 5, 1987 are as follows:

1. Do you favor confirmation of Judge Robert Bork as Associate Justice of the United States Supreme Court?	All Law Schools	Southern Law Schools

Yes	25.3%	28.9%
No	72.2%	71%
Abstain	2.5%	0%

2. Do you believe that it is constitutionally proper for the Senate to consider the judicial philosophy of a Supreme Court nominee when voting on that nomination?

Yes	93.8%	92.1%
No	2.5%	2.6%
Abstain	2.5%	5.3%

3. Do any of the following terms generally describe Judge Bork's judicial philosophy:

Mainstream	13%	10.5%
Extremist	54.3%	50%
Judicial Restraint	34.65%	36.8%
Judicial Activism	27.2%	26.3%
Consistent	15.4%	15.8%
Inconsistent	42%	34.2%

[Notes:

1. Number of respondants: 162 Constitutional Law Professors.
2. Number polled: 958 (all constitutional law professors who are listed as teaching at laws schools accredited by the Association of American Law Schools, according to the AALS directory.)
3. Only signed responses were counted.
4. This survey was written by Professors Eric Blumenson, and Stephen Callahan of Suffolk Univ. Law School; Douglas Colbert of Hofstra Law School; and Stanley Fisher of Boston Univ. Law School. The survey was administered by Prof. Blumenson.]

* * *

Comments by Respondents:

Respondants were also given space to write comments on the Bork nomination if they wished. These comments (and the survey responses) are available on request. The following excerpts are indicative:

"His philosophy is driven by an urge to solve too many of the kinds of problems which come to the Courts by bright and rigid general principles -- exactly the urge which a Justice of the Supreme Court should recognize and suppress."

"...his emphasis on "intent" masks the potential for posturing as "restrained" while engaging in considerable activism."

"...his "interpretivist-originalist" philosophy is still in the mainstream of legal thought".

"I am troubled by Bork's narrow view of liberty (constricted by framer's intent) and his very flexible view

of executive power (unshackled by framer's intent). I suppose too I'm troubled by his notion the court position is an "intellectual feast".

"Art. II, sec. 2, par. 2 is very plain and the original intent is equally so [that judicial philosophy should be considered by the Senate]."

"...Bork's testimony has constricted his position to the point that his influence would not amount to anything like what it is represented to be."

"Re: pornography issues: perhaps [Bork can find] different ways of resisting or slowing social decline".

"[Judge Bork] shows a judicial "conversion" -- he is disavowing his long stream of writings embracing a restrictive view of individual rights; such sudden and self-serving change must be viewed with suspicion".

"[Judicial philosophy] becomes all the more crucial because of the importance of this particular nomination at this time in history -- i.e. the danger of a return to nonsensitivity to the 'Individual Rights' area, involving, among other things, civil rights and civil liberties".

"The American mainstream is very broad. Judge Bork's views are as startling as those of Learned Hand."

"Anthing else [than Senate consideration of judicial philosophy] would be irresponsible".

"Rejection of his confirmation would be ill-advised and would politicize the Court..."

"I do not believe Judge Bork's views on equality jurisprudence are similar to those of Justice Stevens nor do I believe that he is committed to meaningful protections of either liberty or equality under the Constitution."

"I don't believe that ... if a liberty is not granted in the Bill of Rights it doesn't exist. The Bill of Rights, as I read it, was intended as a limitation on government. I would approach its construction diametrically opposite from the way Judge Bork appears to approach it."

"Judge Bork has been lying about his positions".

"I abstain...Bork is clearly qualified and if his philosophy really is what he's testified to, I would support him. However, his past statements are so inconsistent with his testimony that it is hard to know what to believe.

"His position utterly denying the existence of protected rights not specifically designated in the Constitution is more extreme than that of any judge who ever sat on the Court, so far as I know, and violates an unbroken tradition going back to the earliest decisions. Judge Bork appears to me to suffer from a great intellectual vanity, and is in love with his own gamesmanship. These characteristics are not consistent with my idea of judicial temperment. Judge Bork's testimonial account of his judicial philosophy is so seriously at variance with his written record as to cast doubt on his candor...In suggesting that his academic writings were not careful expressions of his views, but were intended merely to brainstorm and to stir debate, he reveals a poor understanding of the obligation of a responsible academic."

"...His obsessive fear of slippery slopes would limit even the explicitly stated ones [fundamental constitutional values] to an exceedingly narrow range."

"He doesn't understand the role of the Court as guarantor of individual liberty and equality. This was not true of Justice Harlan or Frankfurter, whom we associate with "judicial restraint"...his reliance on original intent is a guise that avoids hard questions of justification and masks Judge Bork's personal prejudices about the claims of individuals and groups he does not favor."

AFFIDAVIT

I, David Brandeis Tachau, being first duly sworn, state:

1. I am preparing this affidavit in response to a request from a Senate Judiciary staff member. He has asked me to state my recollection of the circumstances surrounding the preparation of the majority opinion in Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983).

2. I served as a law clerk to Hon. James F. Gordon from approximately September 1, 1982 until December 31, 1983. I previously attended Harvard College (A.B. 1978) and the University of Michigan Law School (J.D. 1982). I am now an attorney in private practice in Louisville, Ky.

3. Within the first several weeks after I had begun as Judge Gordon's law clerk, he delivered to me a draft opinion he had just received from Judge Bork in the Vander Jagt case. Judge Bork had prepared the draft as a proposed opinion for a unanimous panel including Judge Gordon and Judge Roger Robb. Judge Gordon asked me to review Judge Bork's draft opinion and discuss it with him. Judge Bork had circulated his draft opinion with no reference to the reasoning or arguments contained in the opinion.

4. The Vander Jagt case involved a lawsuit by Republican members of the House of Representatives, who were protesting their underrepresentation on critical House committees. The plaintiffs had alleged that their underrepresentation deprived them of equal voting rights in the House. Their suit had been dismissed by Federal District Judge Oberdorfer, and appealed to the Court of Appeals for the District of Columbia Circuit.

5. When I read Judge Bork's draft opinion for the panel, I saw that he proposed to dismiss the appeal because the Republican House members lacked "standing" to bring their suit. I knew of no precedents that supported such a ruling. Because I wanted to see whether the parties had discussed this "no standing" argument, I searched for the briefs Judge Gordon had received before hearing oral argument in the case the previous March.

6. Instead of finding the parties' briefs, I located one

or two sheets of carbon copy paper containing brief summaries of cases Judge Gordon had heard in March. These summaries were apparently prepared by Judge Robb as the presiding judge on the day that the Vander Jagt case was heard. The summary for each case included a brief description of how the panel had decided to rule in the case, together with a designation of the judge who had been assigned to write the opinion.

7. The summary for the Vander Jagt case stated that the panel intended to affirm the district court's dismissal of the suit, but not necessarily for the reasons stated by the district court. The panel's summary explicitly stated that the panel would recognize that the Republican members had standing to bring this suit, but would dismiss the case on other grounds.

8. I showed Judge Gordon the Vander Jagt summary and asked why the rationale for the decision had been changed. Judge Gordon was concerned that Judge Bork's draft was contrary to the panel's previous decision in March, and he wondered aloud whether the explanation for the change in Judge Bork's proposed opinion was that Judge Robb had changed his thinking.

9. Judge Gordon asked me to telephone Judge Robb's chambers and inquire about whether Judge Robb had changed his views. I called Judge Robb's chambers and spoke with his law clerk, Joseph Lee. I asked whether he was aware that Judge Bork's proposed decision did not follow the panel's decision to recognize standing, but instead dismissed the suit on "standing" grounds. I said that Judge Gordon had not been informed of this change, and that he was considering writing an opinion agreeing to dismiss the appeal but on different grounds. Judge Robb's law clerk told me that the matter would be taken up with Judge Robb, who was then in the hospital.

10. Within the next week, Judge Gordon told me that he had been called by another judge from the D.C. Circuit on behalf of Judge Robb. Judge Gordon said that Judge Robb reportedly did not agree with Judge Bork's "standing" argument, and was unhappy the proposed decision had taken that approach. Judge Robb had asked Judge Gordon to prepare a new opinion for Judge Robb and Judge Gordon as the majority. This opinion would grant "standing"

to the appellants, but would decline to adjudicate the lawsuit because of the court's "remedial discretion." The opinion was thus to follow Judge Robb's earlier decision in Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir. 1981).

11. At approximately the same time that Judge Gordon told me of Judge Robb's request, Judge Gordon received a letter from Judge Bork apologizing for not having consulted with Judge Gordon before Judge Bork circulated his proposed opinion for the panel. Thereafter, Judge Gordon received additional letters from Judge Robb and Judge Bork. Judge Robb's letter officially confirmed that Judge Gordon was to prepare a new opinion for Judge Robb and Judge Gordon as a majority of the panel. Judge Robb's letter quoted the summary he had prepared in March of the panel's intended decision, and specifically rejected Judge Bork's "no standing" argument. Judge Bork's subsequent letter defended his "no standing" argument, and also stated that he had previously obtained Judge Robb's agreement to base the panel's decision on these "no standing" grounds. However, Judge Bork acknowledged that Judge Robb had no recollection of having agreed to this reasoning.

12. The process of preparing the final Vander Jagt majority opinion took several months. After Judge Gordon circulated a preliminary draft in November, Judge Gordon received no reaction from Judge Robb's chambers for several weeks. Because Judge Robb was reportedly in the hospital, Judge Gordon was uncertain how to proceed. Thus, in mid-December 1982, Judge Gordon wrote Judge Bork suggesting that Judge Gordon's proposed opinion for himself and Judge Robb be revised to read simply as Judge Gordon's opinion, so that a decision could be issued quickly before Congress adjourned. Judge Gordon was trying to help resolve a difficult

situation. Within several days, Judge Gordon told me that he had received word that Judge Robb wanted a ruling to be issued before Congress adjourned, with opinions to follow later.

13. Judge Robb did join in Judge Gordon's opinion, and eventually after further changes it was issued as the opinion for the panel's majority. Judge Bork wrote separately, concurring in the result but on the grounds that the Republican members lacked "standing."

David B. Tachau

David B. Tachau
4020 Leland Rd.
Louisville, KY. 40207
(502) 893-7248

Subscribed to and sworn before me by David B. Tachau this first day of October, 1987.

Henry M. Brown
Notary Public
State-at-large, Kentucky

My commission expires: June 30, 1991

STATEMENT OF
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
IN OPPOSITION TO THE NOMINATION OF
ROBERT H. BORK
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

September, 1987

Introduction

This statement is presented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, in opposition to the nomination of Robert H. Bork to be an Associate Justice of the U.S. Supreme Court to fill the vacancy left by the retirement of Lewis F. Powell. The UAW has approximately 1.4 million active and retired members in the United States. We represent employees who work in industrial, clerical, technical and professional fields.

Supporters of the Bork nomination have portrayed Judge Bork as a great legal scholar, who is conservative in the tradition of "judicial restraint". In our opinion, the nominee's writings and statements before and after he became a Court of Appeals Judge and his opinions as a Court of Appeals Judge establish that he is far from being a conservative or a "moderate". His statements and his record indicate that he would, if given the opportunity, substantially change Supreme Court interpretations of the Constitution and its protections for the American people.

The Role and Responsibility of the Senate and the Judiciary Committee

Some supporters of the nomination have erroneously argued that the role of the Senate and of this Committee in reviewing judicial nominations should be pro forma. History shows, however, that the role of the Senate is

to be equal to that of the Executive in determining who is acceptable to serve on the Supreme Court and other federal courts. The Senate's responsibility, especially with respect to Supreme Court nominees, is not merely to "rubber stamp" the President's selections but to review them thoroughly as a co-equal partner in the process. We commend this Committee for doing just that.

The Senate has rejected nominees to the Supreme Court some 27 times in our history, and at least nine of the instances related to political reasons. For example, George Washington's nominee for Chief Justice was rejected in 1795 because he had attacked the recently ratified Jay Treaty with England. That early rejection is strong evidence that the drafters of our Constitution intended that the Senate have meaningful power. In 1930, a Republican Senate turned down Herbert Hoover's nomination of Judge John Parker of North Carolina because of his rulings against unions and his statements against blacks. And in 1968 the Senate forced the withdrawal of the nomination of Justice Abe Fortas to be Chief Justice, partly because conservative Senators did not like Justice Fortas' views on law enforcement, free speech, obscenity, capital punishment and other issues.

It is appropriate in the case of the Bork nomination to remind the Senate of this history and to urge each Senator to decide independently whether the nominee will:

1. uphold the Constitutional rights of all citizens, including women, minorities and political dissenters;

2. uphold established judicial precedents;

3. avoid extreme ideological tilt; and

4. not seek to improperly limit the powers of Congress and the Judiciary and enhance those of the Executive Branch.

Judge Bork's Views Considered

An analysis of Robert Bork's views, expressed from the bench and in speeches and articles, show him to be a nominee who would be highly unlikely to meet the four criteria listed above if seated on the Supreme Court.

A summary of Judge Bork's record in split decisions while on the D.C. Court of Appeals is significant: He voted for the government and against Freedom of Information requests or requests under "sunshine"/privacy acts in nine out of nine cases; he voted for the employer and against the union or employees in five out of seven labor cases under the National Labor Relations Act, the Occupational Safety and Health Act and civil service laws; he voted against environmental interests in two out of two nuclear regulatory cases; he voted against civil rights - civil liberties plaintiffs in 15 out of 17 cases, including Constitutional tort claims and claims relating to free speech, free exercise of religion, civil rights attorneys' fees and rights of political refugees and prisoners; he denied or limited access to federal courts on grounds involving standing to sue, federal jurisdiction, limits on judicial review or sovereign immunity in 16 out of 16 cases; he voted against consumers and in favor of regulated business in all ten consumer and rate regulation cases.

Congressional and Executive Branch Powers

Mr. Bork's views of executive powers seem to depend on which executive might be wielding them. In a 1968 article, "Why I Am for Nixon," Bork, who was then a Yale law professor, wrote in The New Republic that the Democratic Party stood for "statism; legal coercion as a substitute for voluntary action; and central planning of economic and social relations" which, he said, "continually encroach upon the freedom liberals value."

On the other hand, Mr. Bork would uphold lawless activities of the Executive Branch of government and limit the powers of Congress when a Republican is President.

In a 1972 law review article and again at his confirmation hearings for the Solicitor General post, Bork defended the legality of President Nixon's actions in ordering the bombing of Cambodia as stemming from the "inherent power of the presidency." This is contrary to Bork's general view that the Constitution must be interpreted as written, since the Constitution explicitly gives Congress the sole power to authorize war.

In 1973, Bork as acting Attorney General fired Special Prosecutor Archibald Cox at President Nixon's request, even though the charter establishing the Office of Special Prosecutor stated that he could be removed only for "extraordinary impropriety."

When Congress then moved to create a Watergate Special Prosecutor, Bork opposed the legislation. Bork not only said that Congress could not name a Special Prosecutor; he said it would also be unconstitutional for Congress to empower courts to appoint Special Prosecutors, although Congress has long had the powers to define jurisdiction of federal courts.

Bork's views on Special Prosecutors are relevant today, because the Constitutionality of the appointment of Independent Counsels has been challenged by Oliver North in connection with the Iran-contra investigation. Special Counsels are also investigating Attorney General Meese and others. If Bork were on the Supreme Court, he could be the swing vote to limit probes into unlawful actions by Executive Branch officials.

Limits on Fourteenth Amendment Protections

Because the Fourteenth Amendment to the United States Constitution was passed in the context of the Civil War, Judge Bork in the past took a

position that would limit the Amendment's safeguards to "formal procedural equality" and its substantive safeguards, including the guaranty of equal protection of the laws, to racial minorities. He wrote: "The Supreme Court has no principled way of saying which non-racial inequalities are impermissible." (Indiana Law Journal, Fall, 1971) Such a position would deprive women and others of protection against unreasonable state action in violation of equal protection of the laws and might even deprive them of due process of law. It is imperative that blacks and other minorities be protected by the Fourteenth Amendment. But the Fourteenth Amendment protections, as written, apply to "any person" and cannot be taken away from other Americans. Had Congress wanted only to base the Fourteenth Amendment protections on "race" or "color," it would have expressly provided so.

First Amendment Limitations

In a famous article, Bork contended that the First Amendment free speech protection should be limited to political expressions. That is a radical position, which would severely limit free speech.

Bork's decisions on free speech as a Court of Appeals Judge are consistent with his favoring free speech protections for political statements but otherwise limiting free speech. For example, while he protected an artist who sought to place an anti-Reagan poster in the Washington subway system and protected newspaper columnists from being sued for alleged defamation against a Marxist professor, indicating that their statements were political, he ruled against conservative students who sought to picket the Nicaroguan Embassy.

Racial Discrimination and Affirmative Action

In a much-publicized 1963 article in The New Republic, Bork opposed the provision of the pending civil rights bill prohibiting discrimination in public accommodations on the grounds that it would infringe upon property rights. Although he later disavowed this view, he took virtually the same position in a December 1968 Fortune article in which he attacked the Supreme Court in Reitman v. Mulkey for striking down a California statute that guaranteed property owners the right to sell or lease their property to whomever they chose.

And the Los Angeles Times reported recently that in 1971, Bork criticized the Court's landmark Shelley v. Kraemer decision of 1948, which held that courts could not enforce clauses in property deeds that permitted owners to restrict the sale of property to members of certain races or religions.

Bork also thought the Supreme Court was wrong in upholding provisions of the 1965 Voting Rights Act, which banned the use of literacy tests under certain circumstances (Katzenbach v. Morgan, 1966). In 1972, while numerous witnesses testified in opposition, he was one of only two law professors to testify in support of the Constitutionality of legislation that drastically curtailed school desegregation remedies, which the Supreme Court had ruled necessary and lawful to correct Fourteenth Amendment violations. As Solicitor General, Bork continued to oppose school desegregation remedies. He unsuccessfully asked the Supreme Court to reverse lower courts, which had provided fair housing remedies for Chicago area low income black citizens, even though the federal government had participated in the discrimination. All Justices rejected Bork's views (Hills v. Gautreaux, 1976).

Bork has also criticized the much-publicized Bakke decision. The majority opinion in that case, which was written by former Justice Powell, adopted what many believe to be a balanced approach to affirmative action. It opposed absolute numerical quotas, but agreed that institutions may weigh various factors, including sex or race of applicants, in order to get a mix of people in higher education programs. Bork has criticized even that approach, which Justice Powell considered to be balanced. Since Bakke, the Supreme Court has upheld the use of race and sex conscious goals in affirmative action plans designed to remedy past discrimination or end imbalances caused by earlier hiring or promotion practices. This type of affirmative action is essential to continued movement toward equal opportunity. In upholding affirmative action, these recent Supreme Court decisions rejected the restrictive arguments of the Reagan Administration by narrow majorities which included the vote of Justice Powell. If Judge Bork is confirmed, the continued vitality of affirmative action could be in grave danger.

"One Man-One Vote" and Privacy Rights

In addition to his opposition to the Court decisions invalidating poll taxes and legislation barring literacy tests for voting, Bork has also vigorously opposed Supreme Court decisions (Baker v. Carr, 1962; Reynolds v. Sims, 1964) affirming the rule of "one man-one vote."

He has also argued that the Constitution does not protect the right to privacy and that the entire line of Supreme Court decisions vindicating such rights is Constitutionally improper. Thus, for example, he has attacked the Supreme Court decision (Griswold v. Connecticut, 1965)

invalidating a state law that banned the use of contraceptives, even by married couples in their own home. By the same "reasoning," Judge Bork could uphold a state law which required the use of contraceptives. Since privacy rights lie at the heart of the Supreme Court's abortion decisions, it is widely believed that Judge Bork's placement on the Court could imperil Roe v. Wade, the 1973 decision in this area. Testifying in 1981 before the Senate Judiciary Committee, Bork described Roe v. Wade as "an unconstitutional decision, a serious and wholly unjustified judicial usurpation of state legislative authority."

Privacy rights can be properly included as among the "Unalienable Rights" noted in the Declaration of Independence and later protected by the Preamble to the Constitution and in its Fourth, Fifth and Fourteenth Amendments.

Property Rights and Economic Efficiency

While Robert Bork's notions of "judicial restraint" have permitted him to downplay the rights of individuals, he has been fairly unrestrained -- an activist, in fact -- in his defense of the rights of property and corporate interests.

Judge Bork is a disciple of the "Chicago School" of judges and legal scholars who analyze problems on the basis of what is most efficient and cost-effective. While he has disassociated himself from the most extreme ramifications of this school of thought, he has nevertheless attempted to deny the whole history of antitrust lawmaking, grounded in the Constitution's commerce clause, because restricting corporate mergers or conglomerates does not conform to Bork's strong free market views. In a 1984 speech to the U.S. Chamber of Commerce, for example, Judge Bork said, "I don't think the antitrust law has any values other than economic efficiency."

Likewise, as a Judge, Bork has subverted Congressional intent in reviewing regulatory decisions in such areas as the environment and occupational safety. In a Clean Air Act case, where Bork was up against statutory language requiring the Environmental Protection Agency to consider only public health factors in setting emission standards, he scoured the legislative history in order to conclude that the cost to industry could also be considered.

In May 1985, Judges Bork, Scalia and Starr dissented from the denial of rehearing by the court's seven other judges in a case where a bank employee's sexual harassment case against her boss had been upheld. Judge Bork warned that under the majority ruling a sexual dalliance would "become harassment whenever an employee sees fit, after the fact" (Vinson v. Taylor).

And in a recent labor case, Judge Bork, joined by Judge Scalia, reversed a decision by the Reagan NLRB which had followed longstanding Board policy protecting employees from being fired for union organizing. The reversal prompted Judge George MacKinnon, a conservative Nixon appointee, to describe the Bork opinion as infringing on "important policy-making prerogatives of the National Labor Relations Board." Judge Bork's ruling denied enforcement of a Board order reinstating two restaurant employees for soliciting union membership (one for less than five minutes) while the employer allowed "non-union solicitation of more substantial magnitude." (Restaurant Corp. of America v. NLRB, September 1986).

Judge Bork's antipathy toward the purposes of the NLRA and his sympathy for employers on health and safety issues is also clear from his record. In Prill v. NLRB (Meyers Industries), a truck driver was fired for refusing to drive an unsafe truck. The Administrative Law Judge held that

he was protected by the NLRA. The NLRB reversed, saying he was not involved in "concerted" activity. The Court of Appeals reversed the NLRB, but Judge Bork dissented in favor of the employer. In contrast to his position in the Restaurant Corporation of America case, here Bork would defer to the NLRB's expertise. The UAW filed friend of the court briefs in this case, which is again before the Court of Appeals.

Bork's "Independence" Once on the Court

The final argument that many Bork nomination proponents use is that once a nominee becomes a member of the Court, he or she is likely to pursue a course independent of the President making the appointment. If nothing else, they argue, any nominee is likely to respect settled law even in cases where his or her views are opposed.

This may be true of some nominees, but it does not seem to apply to Robert Bork. He does not simply disagree with prior court rulings -- he thinks many past decisions are disastrous. We believe he is therefore likely as a Supreme Court Justice to go against settled precedents that may have reined him in somewhat as a Court of Appeals Judge.

Mr. Bork has labeled important past decisions with terms like "improper and intellectually empty" (Skinner v. Oklahoma) and "unprincipled, utterly specious" (Griswold v. Connecticut). Holding such extreme views, it seems Bork would be remiss if he did not seek to change the decisions he deplores.

We believe Judge Bork was nominated precisely because the Executive Branch does not want to risk getting a justice who reverts to a "centrist" position once on the Court. We suspect that Judge Bork was chosen by those who feel they can rely on him to swing the Court to the right and enforce their pro-President, anti-Congress, anti-civil rights and civil liberties views for years to come.

We who oppose Judge Bork will not be put on the defensive by the charge that our opposition is "political." It was President Ronald Reagan who brought politics into the confirmation process by making such a blatantly political appointment.

In our opinion, Judge Bork's views go beyond those of the President and most Republicans in the important legal areas which we have discussed. Robert Bork is not a "moderate", as we understand that term. He is ultraconservative, and his confirmation could result in dire consequences for the people of our nation.

Some have defended Bork's record as a Circuit Judge by noting that most opinions written by him were either allowed to stand because the Supreme Court did not grant review or were affirmed by the Supreme Court. First, the Supreme Court itself (as we believe Judge Bork would agree) holds that its failure to grant review does not imply approval of any lower court decision. Second, the fact that the Supreme Court approves a decision does not mean it is right or that it reflects the views of Congress or of the American people. For example, the Supreme Court, in a 1978 opinion by now-Chief Justice Rehnquist, indicated in General Electric v. Gilbert that denial of medical benefits because of pregnancy was not necessarily sex-based discrimination. That absurd opinion, which defeated Congressional intent, was later corrected by Congress.

During confirmation hearings on Mr. Bork's appointment to the Court of Appeals, he shrugged off some of his more radical positions and indicated that, as a Court of Appeals Judge, he would have to follow the rulings of the Supreme Court. As a Supreme Court Justice, however, Bork could by his vote and persuasion influence the Court to severely limit the acts of Congress and the protections of the Constitution.

In contrast to Judge Bork's recent statement that he would likely follow Supreme Court precedent, he indicated in a 1985 speech that he would not be bound by Supreme Court decisions. Judge Bork may be "independent" if confirmed--but independent of mainstream legal opinions of the last century.

Judge Bork's Claims to Have Recently Changed His Views

Contrary to his almost twenty-five years of legal writing, speeches and judicial opinions, Judge Bork recently indicated that he has modified some of his more radical views limiting free speech and Fourteenth Amendment protections, permitting racially and religiously restricted real estate practices, limiting affirmative action and denying many privacy-related protections afforded citizens in their homes.

This Senate and the American people, however, cannot afford to gamble on whether Judge Bork has really changed his views or whether Justice Bork may return to such radical positions if he is on the Supreme Court. The President should not ask you or the American people to take this gamble.

* * * * *

The UAW urges this Committee and the Senate to ask the President to withdraw the nomination of Robert Bork to the Supreme Court; and we urge that you not consent to this nomination if it is not withdrawn. We appreciate the opportunity to state our position to this Committee and the Senate.

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STATEMENT OF
OWEN BIEBER, PRESIDENT
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE
& AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
IN OPPOSITION TO THE NOMINATION OF
ROBERT H. BORK
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

SEPTEMBER 1987

Mr. Chairman, my name is Owen Bieber. I am the President of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), a Union with 1.4 million active and retired members in all parts of our country. I am pleased to make this statement on behalf of the UAW in strong opposition to the nomination of Judge Robert H. Bork to become an Associate Justice of the U.S. Supreme Court.

Our International Executive Board has agreed unanimously to oppose the Bork nomination. We urge this Committee and the full Senate to reject the nomination — a nomination which we believe to be both unwise and inconsistent with the interests of our nation.

It is our considered judgment, Mr. Chairman, that Robert Bork is clearly not the best possible candidate to fill the Court vacancy. If he were, there would not be the kind of widespread opposition this particular nomination has generated, nor would there have been the almost unprecedented split vote on the ABA's Standing Committee on the Federal Judiciary.

Quite frankly, we believe Judge Bork fails the test of acceptability as a candidate to fill the Court vacancy because of his long-held narrow and rigid conservative positions on issues that are certain to come before the Court. When Judge Bork testified before this Committee he indicated he has significantly modified some of his views from those expressed in his earlier writings, speeches and judicial opinions. In our opinion, the American people cannot afford to gamble on whether those earlier views have indeed changed or whether a Justice Bork would revert to those positions which we believe to be unacceptable to a large majority of our fellow citizens.

We recognize, Mr. Chairman, that Judge Bork's resume is impressive. He has held important positions in the private and public sectors. There's no disagreement about his intelligence or the quality of his academic background. But we submit that those are not the only — or even the most important — criteria by which to judge a nominee for the U.S. Supreme Court.

More relevant considerations are whether the nominee will measure up on the basis of such critical tests as these. Would he:

* Uphold the constitutional rights of women, minorities and political dissenters;

* Uphold established judicial precedents;

* Avoid an extreme ideological tilt; and

* Not seek to limit improperly the powers of Congress and the Judiciary and enhance those of the Executive Branch.

Our examination of the Bork record, expressed from the bench and in speeches, articles and testimony, shows him to be a nominee who would be highly unlikely to satisfy these criteria. Contrary to the arguments of his supporters, we are convinced that Judge Bork would bring with him an ultraconservative social agenda, and it is an agenda our country cannot afford to have played out in the deliberations of the highest court in the land.

Judge Bork is said to be a proponent of the philosophy of judicial restraint. But his record suggests that he is not nearly as consistent a proponent of that philosophy as the White House and others contend. In fact, it appears that his adherence to judicial restraint depends to a large extent upon whom the plaintiffs are in any given case. And if you look beyond his service on the U.S. Court of Appeals for the District of Columbia to his public statements, testimony before congressional committees and his prolific writings, you will find that Robert Bork has been anything but restrained in expressing his views on important issues of the day. In particular, we have been surprised at the vehemence with which Robert Bork has attacked positions taken by those with whom he has disagreed, and the extreme manner in which he has chosen to characterize advocates of opposing positions. His rhetoric has often been anything but restrained.

It may be an oversimplification to say it, Mr. Chairman, but if I had to generalize about Judge Bork's record, I would say that he almost always is inclined to support the "system" against the individual — whatever the "system"

happens to be. He most often sides with the Executive Branch when the issue is between that branch of our government and the Legislative Branch, and you will almost invariably find him on the side of business when corporate interests are involved. He has a point of view which, in our judgment, is far to the right of the American mainstream, and it is for that reason that we believe confirmation of the nomination would be contrary to our national interest. We fear that a Supreme Court with a Justice Bork replacing Justice Powell would be a Court that could be expected to begin the process of reversing much of the social progress which has occurred because of Supreme Court constitutional interpretations over the last three decades.

We know, Mr. Chairman, that your Committee and the Senate are looking well beyond the Bork resume and the arguments used by the Administration in its well-orchestrated attempt to convince you that you should approve the nomination of Judge Bork.

Just after the President nominated Judge Bork for the vacancy on the Court, I wrote to Senators urging that you withhold making early commitments to support the nomination. I did so because we believed that it was important for Senators and the American people to have a full opportunity to become familiar with the Bork record through the media and analyses prepared by those who oppose as well as those who support the nomination. That the text of my letter of July follows:

> Dear Senator:
>
> The nomination to fill a vacancy on the U.S. Supreme Court should be a matter of deep concern to all Americans. The UAW believes the Senate's "advice and consent" responsibility is particularly important in the case of a nominee to our nation's highest court.

You will be urged to support the President's nomination of Judge Robert Bork to fill the Court vacancy created by the retirement of Justice Powell. We hope you withhold making a decision on this critical question until hearings have been completed and there has been an opportunity to review thoroughly all relevant information.

In recent years, the U.S. Supreme Court has had a philosophical balance with the result that some decisions have been applauded by liberals and others by conservatives. We believe the confirmation of Judge Bork could upset that delicate balance.

We are troubled by some of Judge Bork's past positions on issues of fundamental importance to the people of our country. We hope the confirmation process will elicit further information about his positions and his rationale for reaching the positions he has taken.

As noted above, we believe a nomination to the Supreme Court is of upmost importance and a matter which concerns all of us as American citizens. A Supreme Court nomination, in our judgment, differs from a nomination to an Executive Branch position. The Judiciary is a separate branch of government. The President has nominated Judge Bork; we now look forward to the debate associated with the Senate's obligation under the Constitution to provide its "advice and consent" — or non-consent — to this nomination.

Mr. Chairman, I know you and your Committee have considered the pros and cons of the nomination with the greatest care. We have as well. Among the many comprehensive analyses of the Bork record which have been made available to your Committee, I hope you have taken time to read the memorandum on Judge Bork's writings and judicial opinions prepared by the General Counsel of the AFL-CIO and an associate. That memorandum was distributed at a recent meeting of the AFL-CIO Executive Council, of which I, as President of the UAW, am a member. The Executive Council, as you know, voted unanimously to oppose the nomination. I believe that memorandum clearly indicates why it would be impossible for many Americans — minorities, women, workers and others — to take any position other than unequivocal opposition to this nomination.

In coming to its decision to oppose the Bork nomination, the UAW Executive Board had the benefit of a staff analysis of not only decisions and opinions of the nominee as a Judge on the U.S. Circuit Court of Appeals, but also his speeches, statements and articles in which he has forcefully expressed his views over a period of many years. To be honest, Mr. Chairman, we were surprised with much of what we found. We knew about the Bork record as U.S. Solicitor General and his involvement in the so-called "Saturday Night Massacre". We were aware of part of his record as an Appeals Court Judge because of our Union's involvement or interest in many of those cases. But we did not know how rigidly conservative or ideologically-committed to certain points of view he appears to be, as shown by his own written and spoken statements.

Mr. Chairman, the members of your Committee have heard and read extensively about the Bork record. Anything we might say today about the specifics of that record would tend to be redundant. We ask, however, that a more detailed statement, used earlier as a background paper for the UAW International Executive Board, be printed as part of your hearing record. A copy of that statement, which has been revised for submission to this Committee, is appended to this statement.

Mr. Chairman, on behalf of the UAW, I urge that your Committee and the full U.S. Senate exercise your independent responsibility of "advice and consent" to reject the nomination of Robert H. Bork. As I have said, we believe a vote against this nomination will be a vote in our national interest — a vote to continue the Supreme Court on the prudently progressive path of the last

40 years. That course is good for America, and I firmly believe that the great majority of the American people want our Supreme Court to continue in that tradition protecting and broadening the rights of all Americans to social, economic and political justice.

Thank you, Mr. Chairman, for the opportunity to share with you and your Committee the views of the UAW on the vitally-important issues raised by the nomination of Robert Bork to be an Associate Justice of the U.S. Supreme Court.

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Board of Directors
Executive Director
Of Counsel

United States Justice Foundation

TESTIMONY IN SUPPORT OF THE NOMINATION OF
THE HONORABLE ROBERT BORK TO THE
UNITED STATES SUPREME COURT

During the retention election for the California State Supreme Court last year, cries were heard all over the state from leaders of the Democratic Party and of liberal organizations, including organizations and Democratic Party leaders far removed from this state, that Chief Justice Bird and Justices Reynoso and Gordin should be voted upon on the basis of their abilities, not their ideological beliefs.

Now, many of those same groups who protested the use of ideology in the retention elections are now using it as a justification for their attacks on Federal District Court of Appeal Judge Robert Bork, President Reagan's nominee for the vacancy on the United States Supreme Court.

It is interesting that the pious pronouncements of these various liberal leaders and organizations upholding the need to keep ideology out of judicial elections have given way to full scale attacks on Judge Bork, despite his rating by the American Bar Association as "exceptionally well qualified" for a seat on the Supreme Court.

Despite the millions of dollars expended to defeat the nomination of Judge Bork, and the threat made by a number of organizations, including the National Organization of Women, to defeat any United States Senator who supports the nomination, the United States Justice Foundation hopes that reason will prevail and Judge Bork will be confirmed.

I urge you, as a United States Senator, to rise above this hypocrisy and consider the nominee on his abilities, and not on his political philosophy.

Respectfully submitted,

Gary G. Kreep
Executive Director
United States Justice Foundation

September 17, 1987

The Honorable Howard M. Metzenbaum
Senator, United States Congress
Russell Building
Washington, D.C. 20510

Re: Nomination of Judge Robert Bork

Dear Senator Metzenbaum:

I have never written a letter to a member of Congress. While that statement might suggest I am apolitical or apathetic, I believe it more correctly reflects the fact that very few issues strike me as important enough to take pen in hand and write. The issue of Judge Bork's nomination to the United States Supreme Court is, however, an important issue.

I write to you as a law school professor, attorney, and citizen regarding Judge Bork's nomination to the United States Supreme Court. As a law school professor, I am extremely apprehensive about Judge Bork's judicial attitude regarding the interpretation of the Constitution. As I understand his approach to this primary judicial function, he believes the explicit language contained in the Constitution defines the response to the particular inquiry. Such an approach denies the essense and spirit of our Constitution as a living document, capable of responding to changing societal needs.

As a criminal defense attorney, I am distressed by his great willingness to denigrate or destroy the hard-fought-for individual rights of criminal defendants. My belief in this regard is that the Constitution, and specifically the Bill of Rights, was designed to protect those sought to be prosecuted by government. The way in which we treat the lowest members of our society defines the level of our civilization.

As a citizen, I am concerned that his placement on the United States Supreme Court will greatly upset the delicate balance necessary to a proper and thoughtful consideration of the most important issues to our society.

For these reasons, I urge you to vote against Judge Bork's nomination to the United States Supreme Court.

Sincerely,

J. Dean Carro
Assistant Professor of Law

The University of Akron

School of Law
Akron, OH 44325

(216) 375-7331

September 16, 1987

The Honorable Howard M. Metzenbaum
United States Senate
Washington, D.C. 20510

Subject: The Nomination of Robert Bork

Dear Senator Metzenbaum:

I urge you to oppose the nomination of Robert Bork to the United States Supreme Court. As an attorney and a law professor, I am appalled at the prospect that our constitutional jurisprudence may be governed by this extreme radical.

With the proliferation of analyses of Judge Bork's writings and opinions, you already have the full range of arguments. I focus, therefore, on the following:

1. Judge Bork has been a consistent opponent of civil rights legislation and judicial decisions that are essential to the creation and maintenance of a decent society. He opposed public accomodations laws in 1963, when progress in that area was essential to human justice. He opposes the fundamental principle of "one man-one vote."

2. Judge Bork rejects the proposition that individuals have a right to privacy under the United States Constitution. Thus, he would allow unchecked government intrusion into personal lives including government control of whether married couples may use contraceptives.

3. While Judge Bork's positions on privacy and contraceptive use are troubling, they betray a far more dangerous view of the relationship between individuals and their government. Under Judge Bork's jurisprudence, the only rights available to individuals are those specifically enumerated in the Constitution or otherwise granted by government. This is precisely the opposite of the American concept of individual rights. In this country, individuals are "endowed with certain inalienable rights." These rights do not derive from the Constitution or the government, but from our very existence as individuals. The purpose of the Constitution and the Bill of Rights is not to define individual rights, but to provide a framework in which our "inalienable rights" can be protected.

I hesitate to overstate the case, and I certainly would not claim that Judge Bork is a Communist. Still, his concept of rights as deriving from the consent of the state (or, as he might put it, the consent of the democratic majority) is strikingly consistent with the Soviet concept of individual rights. This is not a man we want on the Supreme Court.

4. The Senate has a responsibility to judge this nominee not only on his qualifications as a Yale Law Professor and legal scholar, but on his likely performance as a member of the Supreme Court. At bottom, this is a political question. Whatever arguments the Reagan Administration may make about "original intent" and the role of the court, a vote for Judge Bork is a vote for a country where the rights of minorities are not protected, where the concept of one man-one vote is repudiated, and where government is empowered to interfere with the most intimate details of individual private lives. A vote against him is a vote for moderation and caution in addressing these vital issues.

5. The Reagan administration has had remarkable success arguing that politics should not govern this decision, and that the President's nominee should be approved as long as he "qualified" by significant legal credentials. This argument is contrary to the history of nominations to the Supreme Court and to the very nomination process itself.

First, one of President George Washington's nominees, the highly "qualified" John Rutledge, was rejected by the Senate for political reasons. He has opposed ratification of a treaty with England. Second, under the "advise and consent" clause, the President and the Senate are equals. Both must agree for a nominee to be confirmed. Moreover, both were elected by all of the people, and the Senate, with a more diverse spectrum of views, more accurately represents the American people. The President has no particular prerogative or right to have his nominee confirmed.

I appreciate your attention to my views. I look forward to the Senate's rejection of this nomination.

Sincerely,

William S. Jordan, III
Associate Professor of Law
University of Akron School of Law

UNIVERSITY OF
AKRON

September 17, 1987

The Honorable Howard M. Metzenbaum
Senator, United States Congress
Russell Building
Washington, D.C. 20510

Re: Nomination of Judge Robert Bork

Dear Senator Metzenbaum:

I write to you as a law school professor, attorney, and citizen regarding Judge Bork's nomination to the United States Supreme Court. As a law schonol professor, I am extremely apprehensive about Judge Bork's judicial attitude regarding the interpretation of the Constitution. As I understand his approach to this primary judicial function, he believes the explicit language contained in the Constitution defines the response to the particular inquiry. Such an approach denies the essense and spirit of our Constitution as a living document, capable of responding to changing societal needs.

As a criminal defense attorney, I am distressed by his great willingness to denigrate or destroy the hard-fought-for individual rights of criminal defendants. My belief in this regard is that the Constitution, and specifically the Bill of Rights, was designed to protect those sougnt to be prosecuted by government. The way in which we treat the lowest members of our society defines the level of our civilization.

As a citizen, I am concerned that his placement on the United States Supreme Court will greatly upset the delicate balance necessary to a proper and thougntful consideration of the most important issues to our society.

For these reasons, I urge you to vote against Judge Bork's nomination to the United States Supreme Court.

Sincerely,

Marla L. Mitchell
Coordinator, Trial Litigation Clinic

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UNIVERSITY OF CALIFORNIA, BERKELEY

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TELEPHONE (415) 642- 9523

15 September 1987

The Honorable Joseph R. Biden, Jr., Chairman
The Honorable Strom Thurmond, Vice Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senators Biden and Thurmond,

The enclosed letter by Professors Laycock and Levinson opposing the nomination of Judge Bork has come to our attention. We wish to express our agreement with the content and conclusion of this letter, and to register our strong opposition to the candidacy of Judge Bork. We urge that the Senate not confirm his nomination to the United States Supreme Court. Our views in this matter, of course, are only personal and in no way imply any official endorsement of our opinions by the University of Californa.

Stephen Barnett
Professor of Law

Babette Barton
Professor of Law

Richard Buxbaum
Professor of Law

Robert Cole
Professor of Law

James Crawford
Professor of Law

Malcolm Feeley
Professor of Law

David Feller
John H. Boalt Professor of Law, Emeritus

Willy Fletcher
Professor of Law

Richard Jennings
Coffroth Professor of Law, Emeritus

Thomas Jorde
Professor of Law

Herma Hill Kay
Professor of Law

David Lieberman
Acting Professor of Law

Kristen Luker
Professor of Law

Sheldon Messinger
Professor of Law

Michael Moore
Professor of Law

Frank Newman
Ralston Professor of Law

Andrea Peterson
Acting Professor of Law

Robert Post
Professor of Law

Edward Rubin
Acting Professor of Law

Joseph Sax
Professor of Law

Harry Scheiber
Professor of Law

Marjorie Shultz
Lecturer in Law

Jerome Skolnick
Professor of Law

School of Law
University of California
Davis, California 95616
September 16, 1987

The Honorable Joseph R. Biden, Jr., Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

The Committee of the Judiciary is presently considering the nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court. As teachers of law and as citizens concerned about the preservation of constitutional rights, we ask that the Senate withhold its consent to the nomination.

We oppose the nomination because of a concern that overrides matters of credentials or personal considerations. Judge Bork has developed and has repeatedly expressed a comprehensive and fixed view of the Constitution that is at odds with many landmark Supreme Court decisions protecting civil rights and liberties. In recent years, the Court has become more closely divided in many of the areas covered by these decisions. If Judge Bork is confirmed, his vote could prove determinative in turning back the clock to an era when rights and liberties, and the role of the judiciary in protecting them, were viewed in a much more restrictive way. Such a development would adversely affect the vitality of the Constitution and the health and welfare of the nation.

Judge Bork has written and spoken extensively on Constitutional Law issues. He has expressed opposition to remedies for racial discrimination, challenged important decisions guaranteeing the right to vote, adopted a narrow view of free speech and expression, denounced key right-to-privacy decisions, and criticized key separation of church and state cases.

The issue before the Senate is not properly a partisan matter or one that may be summed up by labels such as "liberal" or "conservative". We believe the record shows that Judge Bork's views of the Constitution would, if

adopted, alter rights which are fundamental to our legal system. If Senators agree with our conclusion, they have both the authority and responsibility to withhold consent to the nomination.

Yours truly,

Leslie A Kuntz
Lloyd Cheney
Martha L. West
Alex E. Brown
Susan F. Deech
Carol S. Bruch
Harrison C Dunning
Edward Barrett
Antonia Bernhard
Margaret J Johns

Names of Signers

Leslie A. Kurtz
Floyd Feeney
Martha West
Alan Brownstein
John Poulos
Susan Frency
John Oakley
Carol S. Bruch
Michael Glennon
Harrison c. Dunning
Pierre R. Loiseaux
Edward L. Barrett
Antonia Bernhard
Margaret Z. Johns
Jean C. Love
Florian Bartosic

In addition to the signers one faculty member who is out of town said that he wished to be included. His name is: Joel C. Dobris.

UNIVERSITY OF CALIFORNIA, SANTA BARBARA

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SANTA BARBARA • SANTA CRUZ

DEPARTMENT OF CHICANO STUDIES

SANTA BARBARA, CALIFORNIA 93106

September 24, 1987

Senator Joseph Biden
The Capitol
Russel Office Bldg.
SR 489
Washington, DC 20510

Dear Senator Biden:

We as members of the Chicano/Latino Faculty Caucus of the the University of California, Santa Barbara are writing to you and other members of the congress to register our total and unequivocal opposition to the appointment of Judge Robert Bork to the U.S. Supreme Court.

We believe that the Bork nomination is detrimental to the interests of the citizens of the United States from many standpoints, the most important of which is civil rights. We are sure that you are familiar with the following court cases, however we wish to go on record by citing specific instances of what we consider to be Judge Bork's wrongful and insensitive interpretation of the United States Constitution.

Voting Rights

Baker v. Carr and Reynolds v. Sims (One-person one-vote) Judge Bork's comments regarding Chief Justice Warren's opinions:

> Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument. ("Neutral Principles", 47 Indiana Law Review 1, 18, 1971).

Harper v. Virginia State Board of Elections (striking down Poll Tax law): In Judge Bork's view there was simply: "no evidence or claim of racial discrimination" (Hearings Before the Senate Committee on the Judiciary on the Confirmation of Robert Bork as Solicitor General, 93rd Cong., 1st Sess. 17 1973.)

Katzenbach v. Morgan and Oregon v. Mitchell (upholding the Voting Rights act of 1965 banning the use of English literacy tests). Judge Bork: "each of these decisions represents very bad, indeed pernicious, constitutional law." (Hearings before the Subcommittee of Separation of Powers of the Senate Committee on the Judiciary of S. 158, 97th Cong., 1st Session. 310, 314 1981).

Language Discrimination

Meyer v. Nebraska, striking down as violative of substantive due process under the Fourteenth Amendment a state statute which barred the teaching of any education course in any language other than English, Bork argued that this case was also wrongly decided. (Neutral Principles", 47 Indiana Law Review 1, 11 1971).

Other Fundamental Issues

Shelley v. Kraemer, which held that the Fourteenth Amendment prohibits state court enforcement of racially restrictive covenants in the sale of property, was the first case in which the Solicitor General filed an amicus brief in a civil rights case. That was Judge Bork who argued that the majority was without constitutional basis in its interpretation of civil rights ("Neutral Principles," 47 Indiana Law Journal 1, 15-17 (1971).

Civil Rights

In 1972 when hundreds of law professors expressed the view that the Nixon administration's legislation curtailing school desegregation remedies which the Supreme Court approved as necessary to cure violations of the Fourteenth Amendment were unconstitutional under Article III there were only two professors that supported the constitutionality of the legislation, one of them being Judge Bork. (Hearings Before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare on the Equal Educational Opportunity Act of 1972, 92nd Cong., 2nd Sess., 1972).

Bork later drafted a brief urging the Supreme Court to review the Boston desegregation case which it declined; the Attorney General, Edward Levi, took the unusual step of overruling the proposal. While Solicitor General, Bork also filed a brief attacking the imposition of interdistrict fair housing remedies favoring minorities even though the federal government had participated in the racially discriminatory placement of segregated public housing (Hills v. Gautreaux). He lost unanimously.

The first of the modern civil rights statutes enacted to forbid segregation in public and private sectors was the omnibus Civil Rights Act of 1964, the key portion of which is Title II. Bork argued that the proposed law was "improper," that is was "legislation by which the morals of the majority are self-righteously imposed upon a minority," that it was an unwarranted "departure from freedom of the individual to choose with whom he will deal," that is was thus premised upon "a principle of unsurpassed ugliness,": and that its enactment was sought by a "mob coercing and disturbing other private individuals" ("Civil Rights--A Challenge," The New Republic (Aug. 31, 1963). That an individual, a lawyer, who held these thoughtful beliefs at that time in the history of our country should be considered for appointment to the Supreme Court in 1987 is simply incredulous to us.

We feel that Robert Bork has been wrong on the most important civil rights issues of our time, issues affecting Hispanics as well as other ethnic minorities. His confirmation as Associate Justice of the United States Supreme Court would be a grave error.

Sincerely,

Mario T. Garcia
Prof. of History/Chicano Studies
Chair, Department of Chicano History

Yolanda Broyles González
Assoc. Prof. of Chicano and Germanic Studies

Juan E. Campo
Assoc. Prof. of Religious Studies

Manuel Carlos
Prof. of Anthropology

J. Manuel Casas
Assoc. Prof. of Education

Concha Delgado-Gaitan
Asst. Prof. of Psychology

Richard P. Duran
Assoc. Prof. of Education

Ramon Favela
Asst. Prof. of Chicano Studies and Art History

Sal Guerena
Librarian and Lecturer

Senator Joseph Biden, page 4

Ray Huerta
Lecturer for Chicano Studies

Mireya Jaimes-Freye
Assoc. Prof. of Spanish and Portuguese

Luis Leal
Distinguished Lecturer of Chicano Studies and Spanish and Portuguese

Francisco Lomeli
Assoc. Prof. of Chicano Studies and Spanish and Portuguese

Juan Vicente Palerm
Assoc. Prof. of Anthropology

Guadalupe San Miguel
Assoc. Prof. of Chicano Studies and Education

Denise Segura
Asst. Prof. of Chicano Studies and Sociology

Federico Subervi
Asst. Prof. of Communication Studies

Ines Talamantez
Assoc. Prof. of Religious Studies

Henry Trueba
Prof. of Education

Linda Facio
Lecturer of Chicano Studies

Zaragosa Vargas
Asst. Prof. of Chicano Studies and History

Olga Najera Ramirez
Lecturer
Chicano Studies

cc: Ralph Neas, Leadership Conference on Civil Rights
Rep. Albert Bustamante (D. - Texas), Chair, Congressional Hispanic Caucus

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN
727 East 26th Street · Austin, Texas 78705 · (512) 471-5151

September 1, 1987

The Honorable Joseph R. Biden, Jr., Chairman
The Honorable Strom Thurmond, Vice Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senators Biden and Thurmond:

Perhaps the single most important task of the Committee on the Judiciary in this session will be to consider the fitness of Robert H. Bork to ascend to lifetime tenure on the United States Supreme Court. The Constitution places upon the Senate the solemn duty of giving or withholding its consent to this nomination. The Senate can withhold its consent, as it has done throughout our history, if in its independent judgment it finds the nominee unfit for the office. We call upon the Senate to withhold its consent to this nomination.

Judge Bork is a man of great intellectual ability. We have no reason to challenge his personal integrity. These are not the issues on which we base our criticisms or to which we call the Senate's attention. Rather, we are concerned with, and ask the Senate to consider, the merits of Judge Bork's views of the Constitution and of the role of the Supreme Court in enforcing the Constitution. As members of an independent branch of government, judges do not work for the President any more than they work for the Senate. Thus, the Senate's voice in their selection is properly equal to the President's. The Senate can legitimately insist that the nominee's general understanding of the Constitution and the role of the judiciary be consistent with the Senate's general understanding. If Judge Bork's views are unacceptable, it is entirely legitimate for the Senate to so advise the President and to withhold its consent.

The notion that the Senate may not directly consider the nominee's views of the Constitution is of recent and uncertain vintage. It may be an overreaction to the risk that the Senate may abuse its power to withhold consent. The Senate cannot insist that the nominee agree with a majority of the Senate on every issue. Nor could the Senate legitimately insist that nominees promise never to hold laws unconstitutional, or never to enforce some unpopular provision of the Bill of Rights. The consent power should not be used to undermine the constitutional role of an independent judiciary as a check on the other two branches.

But it is equally improper for the President to use his power of nomination in such a fashion. If the Senate determines that the President has nominated someone uncommitted to the judiciary's special responsibility for the rights of individuals and minorities, it is entitled -- indeed obliged -- to withhold its consent. The constitutional preventive for abuse of the nomination and consent powers is that each checks the other. The constitutional system works so long as either the President or the Senate insists on judges who will protect civil liberties against occasional majoritarian excesses. If the President nominates such judges, and if the Senate acquiesces, the constitutional mechanism for protecting

individual rights breaks down. Indeed, the very act of confirmation is a form of "consent" to the jurisprudential views of the nominee and therefore a powerful legitimation of the broad approach later taken by the judge. The Senate will not be able to disclaim responsibility for the career of a Justice Bork. As President Reagan recently put it in regard to a different important issue, the Bork nomination is occurring on the Senate's "watch," and each Senator will be properly assessed on how vigilantly he or she lives up to the oath of constitutional fidelity.

There is, of course, a legitimate range of opinion both about the meaning of the Constitution and about the role of the Supreme Court in articulating the constitutional vision. His supporters are presenting Judge Bork as the heir of Justices Frankfurter, Harlan, and other generally admired Justices who endorsed "judicial restraint" and consequent deference to other agencies of government. Yet it is vital to note that these Justices wrote or joined in many of the decisions he has publicly criticized. Judge Bork represents not what might be called a "decent respect for the opinions" of other governmental institutions, but rather a wholesale abdication of the traditional judicial duty to be the special guardians of individual and minority rights.

Much of the press commentary has focused on his strong opposition to the Supreme Court's decisions allowing affirmative action and invalidating restrictions on abortion. These issues have been singled out because they are important to well organized political groups; moreover, the Court has been so closely divided that one vote could change the course of decision. But it would be misleading for debate to be dominated by these especially controversial issues. Judge Bork is also strongly opposed to many decisions that are not controversial, that protect isolated individuals and small or diffuse minorities who are not represented by well organized political groups, and that are essential to any reasonable understanding of constitutional rights.

Perhaps most striking is his extraordinarily narrow notion of what speech is protected by the First Amendment. Although he claims to have recanted some of the most startling aspects of a 1971 article in the Indiana Law Review--for example the notion that "non-political speech" is entitled to no protection whatever--he appeared to reaffirm those views as late as his 1982 confirmation hearings. At that time he conceded only that while on the Court of Appeals, he would be bound by contrary Supreme Court precedent. He does appear to have conceded that moral discourse and at least some novels can sufficiently relate to politics to be protected. But there is no reason to believe that he would give any protection at all to speech to which he, for whatever reason, denies "political" status.

Moreover, he has not retreated one inch from perhaps the most troubling assertion of that article: He argued that speech advocating civil disobedience is not "political" and therefore is entitled to no protection. Thus, he would apparently allow the jailing of Martin Luther King for merely advocating civil disobedience. This pernicious doctrine has received no serious support from a Justice of the Supreme Court for half a century. Judge Bork admitted as much even as he derided the seminal civil liberties opinions of Justices Holmes and Brandeis, opinions that are the foundation of modern free speech law. Putting fidelity to doctrine to one side, we also note the obvious fact that the inspiring success of the civil rights movement--an example of fundamental political reform achieved basically within the structures of the American political system--depended in significant measure on the effective use of what is now constitutionally protected speech, including calls for civil disobedience. A view of the free speech clause that would blithely tolerate the jailing of Dr. King is itself subversive of the central purpose of the clause.

Some of Judge Bork's most severe criticism has been reserved for the "privacy" decisions. It is absolutely crucial to recognize that his antagonism to these decisions goes well beyond questioning Roe v. Wade, the 1973 abortion decision. He denounces them all, including Griswold v. Connecticut, the 1965 decision that invalidated a state law prohibiting married couples from using contraceptives. Justice Harlan joined in Griswold. Roe is obviously controversial; indeed, we are divided in our assessment of that decision. But none of us believes for a moment that opposition to Roe entails a belief that the majority may authorize limitless incursions into the most intimate aspects of personal life, as Judge Bork seems to argue. We doubt that the Senate holds that view either.

Also revealing of Judge Bork's views of judicial role is his attack on the Court's invalidation of grossly unbalanced legislative districts and the subsequent adoption of the "one person-one vote" standard. These cases are classic illustrations of the structural necessity for judicial review. Before these decisions, a majority of the legislature in many states represented only twenty percent of the population. The favored twenty percent could never be expected to relinquish control through voluntary redistricting. Incumbents do not vote themselves out of office in such large numbers. The remedy for such a wrong had to come from the courts or it would not have come at all. Yet in the name of deference to popular rule, Judge Bork would have deferred to perpetual rule by small minorities.

Judge Bork's theory of the equal protection clause is revealing in several ways. First, it is extraordinarily narrow. He believes that the clause protects only against racial discrimination. In Judge Bork's Constitution, there would be no constitutional remedy for sex discrimination or any other form of discrimination, however arbitrary. And even with respect to race, Judge Bork takes a narrow view of the equal protection clause. For example, he would permit judicial enforcement of restrictive racial covenants, a practice unanimously held unconstitutional forty years ago.

There is no textual warrant for the view that "equal protection of the laws" refers only to racial discrimination. The clause is written in general terms and does not mention race. Nor is there much historical warrant for that view. We know that discrimination against blacks was a central target of the clause, but we also know that discrimination against white abolitionists, Republicans, and carpet baggers were important targets of the clause. Thus, there is ample historical evidence that the general language of the equal protection clause was quite deliberate, and that any form of arbitrary discrimination may be examined under the clause.

Judge Bork attempts to justify his judicial views by saying that he merely defers to legislatures and never imposes views of his own. But his views on equal protection impeach that claim. He would apparently strike down all forms of affirmative action for racial minorities, on the ground that affirmative action discriminates against whites. He would also strike down Congressional attempts to expand the protections of the fourteenth amendment by legislation. Thus, he would strike down the Voting Rights Act of 1965, perhaps the most important and successful civil rights act ever passed. These views cannot be explained in terms of judicial restraint or deference to the legislature. Rather, Judge Bork appears far more deferential to the political branches when they discriminate against minorities, and less deferential to the political branches when they act to protect minorities.

Opinions obviously differ both about the merits and the constitutionality of affirmative action. But whatever one

thinks of affirmative action, it cannot be that affirmative action is the one significant violation of individual rights in our time. A judge who would reject nearly all individual rights claims except those of whites challenging affirmative action should not be entrusted with final authority to enforce the Constitution.

Other issues also reveal Judge Bork's unwillingness to defer to Congress when he disagrees. He takes an extraordinarily narrow view of Congressional powers and a correspondingly broad view of executive powers. He would apparently strike down the War Powers Act and any effective form of independent prosecutor law. He would not allow Senators or Representatives to challenge executive action in court, even to test purely legislative powers such as the opportunity to override a pocket veto. He takes an extraordinarily expansive view of the executive's power to withhold information from Congress and the public.

Yet another example is Judge Bork's hostility to Congressional understanding of the antitrust laws. He would construe the Clayton Act and all other twentieth century antitrust laws as narrowly as possible, because he believes Congress was mistaken when it enacted them. He would construe the Sherman Act to serve the single goal of economic efficiency, because he believes that Congressional desire to protect small businesses was mistaken. Whatever the merits of his antitrust theories, they are not consistent with his pose of deferring to Congress and insulating judicial decisions from his personal views.

We have summarized views that Judge Bork has expressed in print, and we have so far assumed that he will act on those views if he becomes a member of the Supreme Court. He will act on these and similar views with respect to all new issues before the Court, and he will construe very narrowly those precedents with which he disagrees. He may follow precedent on some settled issues; we do not know whether he will seek to overrule all past decisions with which he disagrees. But Judge Bork will surely attempt to overturn those decisions that he considers gravely in error; it would be naive to assume otherwise.

There is nothing objectionable in principle about overruling seriously erroneous precedents. A judge would be remiss to his own oath if he adhered to decisions that he considers important departures from the Constitution. We are not committed in this country to a doctrine that precedent controls in constitutional cases even when clearly wrong. Our tradition is one of overruling past errors, and it is not a legitimate criticism of Judge Bork simply that he would deviate from precedent.

Rather, the Supreme Court's power to remake constitutional law is precisely why the Senate must examine with care the particulars of Judge Bork's constitutional views and come to its own conclusion about their merits. This Senatorial duty is even more important when, as at present, the Court is closely divided in many important areas of the law. If Judge Bork is confirmed, his vote could prove determinative in limiting or overruling many of the protections that the Supreme Court has deemed necessary to achievement of the basic constitutional vision over the past several decades. His voting record is extreme even on the Court of Appeals, where he was bound by Supreme Court precedent. To elevate this judge to the Supreme Court, where the constraints of precedent will be far weaker, is in effect to endorse future attempts to overrule the scores of decisions he has criticized.

Professor Philip Kurland, a noted proponent of judicial restraint, has nonetheless written that it is not too much "to ask of a member of the high court that he be more than a technically well-equipped lawyer, that he also display the

qualities of humility and compassion and understanding--of statesmanship[.]" Professor Kurland's mentor, Justice Frankfurter, himself once noted that "the process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the Justices are their 'idealized political picture' of the existing social order.'" Judge Bork has portrayed an "idealized political picture" that would lead to further aggrandizement of governmental (and especially executive) power and leave unpopular individuals and minorities without any significant recourse to the federal judiciary. He has a right to hold those views. What he does not have a right to is automatic elevation to the Supreme Court.

We would be pleased, both as professors of law and as concerned citizens, to elaborate further on these points should that be deemed helpful to the committee in its important deliberations. It should be clear, of course, that our opinions are only personal and in no way imply any official endorsement of our views by The University of Texas.

Respectfully,

Douglas Laycock
A. Dalton Cross Professor at Law

Robert W. Hamilton
Minerva House Drysdale Regents Chair in Law

Michael E. Tigar
Joseph D. Jamail Centennial Chair in Law

Harold H. Bruff
John S. Redditt Professor of State and Local Government Law

Edward F. Sherman
Angus G. Wynne Professor of Law

John A. Robertson
Baker & Botts Professor of Law

Calvin H. Johnson
Arnold, White & Durkee Centennial Professor of Law

David M. Rabban
Vinson & Elkins Professor of Law

Zipporah Batshaw Wiseman
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Assistant Professor of Law

Bea Ann Smith
Adjunct Professor of Law

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Jan Patterson
Adjunct Professor of Law

UNIVERSITY OF WISCONSIN LAW SCHOOL
Madison, Wisconsin 53706

AN OPEN LETTER TO THE MEMBERS OF THE SENATE JUDICIARY COMMITTEE

We are members of the University of Wisconsin Law Faculty and, among us, hold views which cover the political spectrum. In addition, our backgrounds include those of us whose past work has been in academia, in government service and on behalf of business and corporate as well as individual clients. Despite this diversity in background and political views, we are united in urging that the nomination of Robert Bork to the United States Supreme Court be defeated.

While a nominee's political or philosophical views are often overlooked by the Senate in the search for ability and integrity, there is no constitutional mandate for such a limited Senate "advice and consent" function. President Washington's nomination of John Rutledge and President Johnson's nomination of Abe Fortas as Chief Justice and many in between were rejected on philosophical grounds. It is entirely consistent with the Senate's historical role to consider Robert Bork's views.

Among the major issues before the Supreme Court in the indefinite future will be several dealing with efforts by government, at all levels, to probe and regulate individual behavior utilizing the amazing break-throughs in technology that we are now seeing and will continue to see. Some examples are efforts utilizing advances in genetics and genetic engineering and electronic surveillance and monitoring. Questions about AIDS related legislation and practices will also find their way onto the Court's calendar. We do not for a moment believe that all of these questions have to be resolved against governmental power. Nevertheless, the thought of a phalanx of five justices invariably and inevitably in favor of what the government does at the expense of the individual is frightening. Robert Bork would be the fifth.

As you know, Robert Bork subscribes to the theory of original intent and believes, essentially, that no individual protections should be read into the Constitution that were not intended by the framers when the Constitution was adopted. This is precisely the kind of cramped approach to the Constitution that will result in a massive enlargement of government power at the expense of the individual. For example, it takes no great historical insight to know that when the Bill of Rights was adopted, it was the excesses of the British Government over the prior centuries that were sought to be avoided -- brutal interrogation techniques, persecution on account of religion, invasions of the home, suppressions of a free press, trial without jury, trials in places other than the venue of the accused, etc. The drafters of the Bill of Rights were good historians and knew about these abuses and did their best to keep them from recurring in the new Republic.

But brilliant as they were, there is no way they could have foreseen how the age-old problem of reconciling a workable government and individual rights would manifest itself 200 years down the road. They could look back 200 years to Queen Elizabeth's Star Chamber but they could not look ahead 200 years to compulsory genetic testing or whatever the precise questions the Court will have to address in the near future.

The Constitution is a living document precisely because it represents a cautious and wary approach to the exercise of governmental power. A Justice who confines its protections to 18th century fears or to those prevalent when the 14th Amendment was adopted over a hundred years ago saps it of its vitality.

As you can see, we are not in blind opposition to a conservative nominee. Indeed, our position -- grounded on a concern that government power be checked -- could accurately be labelled conservative. We would certainly not urge defeat of a nominee such as retiring Justice Powell. Robert Bork, however, is not that kind of moderate conservative. He is an ideologue whose repeated and passionately expressed views commit him to the inevitable expansion of governmental power. We urge that you vote against his nomination.

Ann Althouse
Richard Bilder
Abner Brodie
Peter Carstensen
Arlen Christenson
Carin Clauss
Walter Dickey
Howard Erlanger
Martha Fineman
G. W. Foster
Marc Galanter
Herman Goldstein
Hendrik Hartog
Stephen Herzberg
J. Willard Hurst
James E. Jones, Jr.
Leonard Kaplan
John Kidwell
Neil Komesar
Lynn LoPucki
Stewart Macaulay
James MacDonald
Marygold Melli
Samuel Mermin
Joel Rogers
Frank Remington
Vicki Schultz
Gerald Thain
David Trubek
Frank Tuerkheimer
June Weisberger
William Whitford
Zigurds Zile

cc: Wisconsin Congressional Delegation September 16, 1987

KENNETH H. VOLK
ATTORNEY AT LAW
ONE BATTERY PARK PLAZA
NEW YORK CITY, NEW YORK 10004
[illegible]

VIA TELECOPIER

September 24, 1987

The Honorable Orrin G. Hatch
United States Senate
Capitol Hill
Washington, D.C.

Dear Senator Hatch:

I am a Senior Partner in the law firm of Burlingham Underwood & Lord in New York City and I have been a member of the Association of the Bar of the City of New York for thirty-three years.

On Friday, September 25, Mr. Robert M. Kaufman, President of the City Bar Association will testify in opposition to the nomination of Judge Bork for Justice of the Supreme Court. Mr. Kaufman will say that he speaks for the Association and its members. He does not.

The opposition of Mr. Kaufman and the Executive Committee of the Association is not, as they concede, based upon the qualifications of Judge Bork, or his competence, intellect or ability. It is based purely on philosophical differences. The leadership of the Association happens to be in the hands of those with a liberal persuasion. However, there are thousands of members with a different point of view and Mr. Kaufman does not speak for us.

It is ironic that Mr. Kaufman in opposing Judge Bork's nomination is adopting one aspect of Judge Bork's philosophy by imposing the majority view - at least as expressed by the Executive Committee - upon the rest of the membership of the Association.

I urge that Judge Bork's nomination be confirmed.

Sincerely yours,

Kenneth H. Volk

KHV:ajm
cc: Paul J. Curran, Esq.
Messrs. Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue

JAMES VORENBERG
LANGDELL HALL
CAMBRIDGE, MASSACHUSETTS 02138

September 28, 1987

The Honorable Joseph R. Biden, Jr.
The Honorable Strom Thurmond
Senate Judiciary Committee
Washington, DC 20510

Dear Senator Biden and Senator Thurmond:

It has come to my attention that my name appeared as a signer of a letter by law school deans opposed to Judge Bork's confirmation. While I am opposed to confirmation and agree with the conclusion of the letter, I did not intend to be listed as a signatory. The appearance of my name on the letter was the result of a perfectly understandable mistake in communication.

I did authorize the Lawyers Committee for Civil Rights to list me as one of the trustees of that organization who endorsed the Committee's statement in opposition to confirmation.

I would appreciate it if this letter could be noted in the appropriate records.

Yours truly,

James Vorenberg

WASHINGTON COUNCIL OF LAWYERS

September 18, 1987

Senator Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Nomination of Hon. Robert H. Bork to the Supreme Court of the United States

Dear Senator Biden:

The Washington Council of Lawyers is a nonpartisan voluntary bar association in the Washington, D.C. area committed to the encouragement of pro bono and public interest legal practice and the promotion of equal justice under law. Although we have recently undertaken to comment on the qualifications and fitness of nominees to federal judgeships in the District of Columbia, we generally do not comment on nominees to the Supreme Court. We are compelled, however, to do so now and oppose the nomination of Hon. Robert H. Bork to the Supreme Court of the United States.

In performing its obligation to advise and consent concerning a nomination to the Supreme Court, we believe the Senate must not limit its consideration to the nominee's competence alone. The Senate has a duty to consider the nominee's commitment to principles of equal justice under law. While there is ample room on the Supreme Court for a variety of views, philosophies and theories of constitutional interpretation, the Senate should not confirm a nominee whose judicial philosophy demonstrates a fundamental hostility to the notion that equal justice under law is embodied in the Constitution.

Judge Bork, over a period of almost twenty-five years, has demonstrated that hostility to equal justice in his judicial opinions, scholarly writings and public statements. For example, he vigorously opposed enactment of the public accommodations section of the 1964 Civil Rights Act.[1] While he has since qualified his earlier views on that statute, his subsequent writings demonstrate consistent opposition to long-accepted interpretations of the Constitution which further equal justice.

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* Member of the Executive Committee

He has written that courts are not restrained by the Fourteenth Amendment from enforcing agreements to discriminate on the basis of race;[2] that the Fourteenth Amendment's equal protection clause does not apply to any groups other than racial and ethnic minorities;[3] that poll taxes are not discriminatory under the Fourteenth Amendment;[4] that Congress lacks the authority to prohibit tests in determining voter qualifications;[5] and that the one-person, one-vote principle is without constitutional basis.[6] As a judge, moveover, he has voted to uphold discriminatory practices such as sexual harassment as not prohibited by the Civil Rights Act, a view later unanimously rejected by the Supreme Court.[7]

Fostering equal justice requires that litigants, especially the poor, the disabled and consumers, have access to the courts. Judge Bork has consistently voted to deny access to litigants based on his views of standing, sovereign immunity and other restrictive doctrines.[8]

Judge Robert H. Bork, in his often-expressed views, has placed himself well outside the spectrum of judicial philosophies held by members of the Supreme Court for half a century. We believe that the Senate has a responsibility to assure that Justices of the Supreme Court are committed to its critical role in protecting individual rights and fulfilling the ideals of equality on which this nation is founded. Judge Bork's record cannot provide those assurances to the Senate and it therefore should not confirm his nomination.

I respectfully request that this letter be included in the record of the Committee's proceedings on the nomination of Judge Bork.

Very truly yours,

Dennis A. Henigan
President

N O T E S

1. Bork, "Civil Rights -- A Challenge," New Republic, August 31, 1963; Bork, "Civil Rights -- A Rejoinder, New Republic, September 21, 1963.

2. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana L.J. 1, 11 (1971), criticizing Shelley v. Kraemer, 334 U.S. 1 1948).

3. "Neutral Principles" at 11.

4. Nomination of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General. Hearings before the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. 5, 17 (1973) (Statement of Robert H. Bork), criticizing Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). See also Bork, Forward to McDowell, The Constitution and Contemporary Constitutional Theory (1985).

5. Nomination Hearings at 16, criticizing Katzenbach v. Morgan, 384 U.S. 641 (1966). Statement of Robert H. Bork, Hearings Before the Subcommittee on the Separation of Powers of the Senate Judiciary Committee on S. 158: A Bill to Provide that Human Life Shall be Deemed to Exist from Conception, 97th Cong., 1st Sess. 310, 314 (April-June, 1981), criticizing Katzenbach v. Morgan and Oregon v. Mitchell, 400 U.S. 112 (1970).

6. "Neutral Principles" at 18-19, criticizing Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Lucas v. Forty-Fourth Gen. Ass'y, 377 U.S. 713 (1964).

7. Vinson v. Taylor, 760 F.2d 1330 (D.C.Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc), aff'd sub nom; Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986).

8. See, e.g., Barnes v. Kline, 759 F.2d 21 (D.C.Cir. 1985) (Bork, J., dissenting) (congressional standing); Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.D.Cir. 1987); Bartlett v. Bowen, 816 F.2d 695 (D.C.Cir. 1987) (Bork, J., dissenting) (sovereign immunity); Robbins v. Reagan, 780 F.2d 37 (D.C.Cir. 1987) (Bork, J., concurring) (reviewability of agency actions); Brown v. United States, 742 F.2d 1498 (D.C.Cir. 1984) (Bork, J., dissenting) (local rules used to defeat constitutional claim).

STATEMENT BY THE WASHINGTON LEGAL FOUNDATION
ON THE NOMINATION OF JUDGE ROBERT H. BORK
BEFORE THE SENATE JUDICIARY COMMITTEE

The Washington Legal Foundation ("WLF") hereby submits this brief statement for the record on the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court. We were originally requested to testify at these hearings by Committee member Senator Gordon Humphrey; however, because of the delays in the hearing process, it does not appear that we will be given an opportunity to present our views orally. Nevertheless, in response to the Committee's request, we wish to present these written views for the record along with the attached article on the American Bar Association which is relevant to these hearings. Should the Committee decide to have us either testify or respond to written questions, we would be happy to do so.

-Interests of the Washington Legal Foundation

WLF is a nonprofit, public interest law and policy center, with 120,000 members and supporters nationwide. WLF is a strong advocate in the courts, agencies, and policy-making arena of the free enterprise system, a strong national security and defense, the rights of crime victims, and individual rights. WLF has represented over 200 U.S. Senators and Congressmen in the courts on various issues. We have been long active in judicial reform and the judicial selection process.

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Our publications in this area include monographs in judicial selection such as "Reagan and the Courts: Prospects for Judicial Reform," by Professor Rice of Notre Dame Law School; Bain, "The President's Power to Appoint Federal Judges: A Popular Check on Court Usurpations"; and most recently, Eaton, "Bork and the Confirmation Game."

In addition, we have filed a lawsuit which is pending in the courts alleging that the ABA's Committee on Federal Judiciary violate the Federal Advisory Committee Act by meeting in secret and by working with liberal public interest groups.

Qualifications of Judge Robert H. Bork

There can be no doubt that Judge Robert H. Bork is exceptionally well qualified to serve as an Associate Justice of the Supreme Court. His academic background, his notable service as Solicitor General of the United States, and more importantly, his judicial record on the U.S. Court of Appeals for five years, make him the ideal choice. His jurisprudential philosophy of judicial restraint which looks to the intent of the lawmaker underscores the proper role of the courts to interpret the law rather than make it. In a democratic society, the lawmaking role properly belongs to the poltical branches, accountable to the people, rather than to unelected, unaccountable judges.

Much has been said and written about Judge Bork's writings and decisions. The record will show, however, that his critics have seriously distorted Judge Bork's statements and decisions. Unlike politicians who vote on policy issues embodied in legislation, a judge's role in deciding a case is to apply the

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Constitution or that law he has before him regardless of his personal preferences. For example, a vote by a Congressman on a social issue reflects his personal views on the matter. A view by a judge, however, against a particular ruling should not, and in Judge Bork's case, does not, reflect his personal preference on the underlying issue at hand. Just as it is unfair for a Congressmen to be considered "for" or "against" a certain measure based on a procedural vote that indeed may be justified on other legitimate grounds, so too is it unfair to criticize Judge Bork for being "against" civil rights or privacy because of his criticism of the court's rationale in certain cases.

By any reasonable standard, Judge Bork's record is impressive. He has participated in over 400 decisions, none of which have been reversed. Six of the cases in which he has dissented were reviewed by the Supreme Court, and in all six, the Court agreed with him. Just last year, Justice Powell writing for the majority in Matsushita Electric v. Zenith, quoted favorably from Judge Bork's book on anti-trust law. Justice Stevens, who is considered a moderate to liberal on the Court, has endorsed Judge Bork, as well as former Carter advisor Lloyd Cutler and former Attorney General Griffin Bell. Even Governor Mario Cuomo indicated that if Judge Bork is the kind of judge that defers to the decision of the political branches, then that's the kind of judge we need.

While the distortion of and outright lies concerning Judge Bork's judicial record have been exposed during these hearings, his critics have now made a new argument: his fine judicial record does not count for much because Judge Bork was bound by

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precedent. Yet cases do not come before the court tied up into neat packages which can easily be decided by precedent. Otherwise, there would be no need for all those legal briefs and oral arguments. The following case is a good example.

In Emory v. Secretary of the Navy, No. 85-5685 (1987), a black naval reserve officer claimed discrimination by the military as the cause of his failure to be promoted. His case was dismissed by a female district judge, appointed by President Johnson, who ruled that the courts should defer to the military and executive branch. Judge Bork, along with two other white male Reagan appointees, reversed, stating "[w]here it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals." How's that for an example of Judge Bork's insensitivity to civil rights and deference to the government? The district judge was just as bound by precedent as was Judge Bork, and yet he ruled for the civil rights plaintiff, as he has in most of his cases. Accordingly, Judge Bork's fine judicial record should be given substantial weight over some of his views written as a law professor 20 years ago. The proof, as they say, is in the pudding.

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Judge Bork's "crime" is that he is being nominated now, rather than earlier, for example, instead of Justice Scalia whose views and record are very similar to that of Judge Bork. In other words, Bork's critics are saying in effect that it is alright to have principled jurists on the bench who believe in judicial restraint, as long as they don't make any difference. The moral bankruptcy of this position is self-evident.

The Role of the American Bar Association

As noted previously, WLF has filed a lawsuit challenging the legality of the ABA in evaluating judicial nominees. Washington Legal Foundation v. Department of Justice, No. 86-2883 (D.D.C.) Even Ralph Nader's Public Citizen group has joined us, albeit belatedly, in this suit. In our view, the negative votes cast against Judge Bork were the result of heavy lobbying efforts by anti-Bork interest groups. Further, the appearance of a conflict of interest by some of the members of the ABA Committee in this and other situations raises serious ethical problems that call for a full inquiry by this committee. Attached hereto and incorporated in to our statement is an article, "The Questionable Role of the American Bar Association in the Judicial Selection Process" written by the Washington Legal Foundation and published recently in the book, "The Judges War."

Thank you for considering these views.

Respectfully submitted,

DANIEL J. POPEO
General Counsel

PAUL D. KAMENAR
Executive Legal Director

Date: September 23, 1987

WASHINGTON, DC 20006
202-857-0240

Edited by Patrick B. McGuigan and Jeffrey P. O'Connell

CONGRESSMAN TED WEISS (D-NY)

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE

ON THE CONFIRMATION OF JUDGE ROBERT H. BORK

SEPTEMBER 29, 1987

Mr. Chairman, Members of the Committee, I appreciate this opportunity to testify on the nomination of Judge Robert Bork for Associate Justice of the Supreme Court.

Last week our nation celebrated the 200th anniversary of the Constitution. On this historic occasion, I urge the Members of this Committee to consider that the confirmation of Judge Bork may very well jeopardize constitutionally guaranteed rights and freedoms.

You have heard from many distinguished witnesses who have detailed Judge Robert Bork's long record of hostility towards women, minorities, and public interest groups. I share their concern and believe that Judge Bork's record on these issues alone is basis enough to reject his nomination. However, I will not dwell on those issues, which have been passionately and, I think, convincingly discussed already. What is of special concern to me as a Member of Congress, and I'm sure to you as well, is Judge Bork's demonstrated disregard for congressional enactments and Supreme Court precedent.

Articles I, II, and III of the Constitution, establish the Executive, Legislative, and Judiciary branches of Government. Though not explicitly detailed, one of the most critical and well-settled constitutional doctrines is the separation of powers. Judge Bork has demonstrated his disregard for this well-established doctrine by consistently advocating the supremacy of the executive branch over the legislative and judicial branches and by limiting the role of the courts as a recourse for Congress in its disputes with the President.

This is a rather stilted view of the philosophy of "judicial restraint," for it requires the courts to defer to the executive branch, and it flies in the face of the traditional view of the separation of powers.

In case after case, Judge Bork has sided with the Reagan Administration against public interest groups and individual citizens. His habitual deference to the Reagan Administration has not only proven injurious to consumers and public interest groups, but has in certain instances, directly subverted the will of Congress.

In McIlwain v. Hayes, 690 F.2d 1041 (1982), the question before the Court was whether the Food and Drug Administration had the authority to permit the sale of inadequately tested color additives twenty-two years after Congress had forbidden manufacturers to do so. Judge Bork voted in favor of the FDA and the chemical industry.

This decision clearly violated both the spirit and the intent of the 1960 Color Additives Amendments to the Food, Drug, and Cosmetics Act, which stipulated that all color additives were to be deemed unsafe unless proven otherwise. When Congress shifted the burden of proof from the FDA to the industries (in the 1960 Amendments), they provided for a two and one-half year transitional period, during which time, commercially established color-additives were permitted to remain on the market while the industry completed safety testing. The statute permitted the Commissioner discretionary authority to extend the two and one-half year period only when such an action was consistent with the objective of the Amendments.

A twenty year extension was clearly not what Congress intended. By upholding FDA actions, Judge Bork endorsed the power of the executive to defy the laws laid down by the legislature.

In his dissent, Judge Abner Mikva described Judge Bork's decision as "ignor[ing] the fact that Congress has spoken on the subject and allow[ing] industry to capture in court a victory that it was denied in the legislative arena."

In Natural Resources Defense Council v. Environmental Protection Council, 804 F.2d 711 (1986), Judge Bork deferred to

he EPA's interpretation of provisions of the Clean Air Act
espite the fact that in doing so, he clearly ignored Congress'
egislative intent.

In passing the Clean Air Act, Congress made it clear that
he protection of the public health was to be the governing
actor in the setting of emission standards for pollutants; yet
n deciding this case, Judge Bork upheld an EPA regulation which
ut the financial interest of a chemical company ahead of the
ublic health. Judge Skelly Wright described Judge Bork's
ecision as "coming perilously close to establishing an absolute
ule of judicial deference to agency interpretations." He
oncluded that Judge Bork had ignored "both the letter of the Act
nd the uncompromising spirit behind it."

In ruling on cases brought under the Freedom of Information
ct, Judge Bork consistently gave the executive branch the
uthority to withhold information from the public. He sided with
he Executive branch in seven out of seven split cases brought
nder the Freedom of Information Act, despite the fact that in
he statute, Congress clearly stated that no deference was to be
ccorded to the Executive Branch in FOIA cases.

In Crockett v. Reagan, 720 F.2d 1355 (1983), Judge Bork
oted to deny Congress the standing to sue the President over the
egality of his activities in El Salvador. Bork claimed that
ongressional intervention was a violation of the Constitution.

In Abourezk v. Reagan, 785 F.2d 1043 (D.C. cir 1986), Judge
rk supported a State Department decision to deny visas to four
iens because of their political affiliation in spite of the
ct the the McGovern Amendment prohibits such an exclusion. In
s minority opinion, Judge Bork described the McGovern Amendment as
monstrating "a lack of deference to the determination of the
partment of State."

Are we, as Members of Congress, to refrain from passing
gislation we deem necessary and important for fear of showing a
ack of deference" to the executive branch?

It is clear from these examples that Judge Bork does not hesitate to uphold Administration policies, even in cases where such rulings directly contravene congressional statute and intent. Serious questions are raised about whether, as a member of the nation's highest court, Judge Bork would require the executive branch to adhere to the Constitution.

Robert Bork has also indicated that, as a Supreme Court Justice, he would not feel obliged to uphold Court precedent on constitutional questions. Despite his recent attempt to convince this Committee that he would respect Court precedent, Judge Bork's record stands -- his objections to many of the leading Supreme Court decisions are passionate and entrenched. And, Judge Bork has candidly acknowledged that he has in mind a specific agenda of Supreme Court decisions he would like to reopen ("A Talk with Robert Bork,"District Lawyer, vol.9, no.5, May/June 1985). Such an agenda belies the very essence of the judiciary -- objectivity and openmindedness.

The Supreme Court is not an executive agency. We can not permit a President to undermine the independence of this co-equal branch of government. The Framers of the Constitution divided responsibility for the appointment of Supreme Court Justices to, in the words of Alexander Hamilton, "prevent the President from appointing Justices to be the obsequious instruments of his pleasure." The Senate's role in the confirmation process is vital to the preservation of the separation of powers.

The Senate owes no special deference to the President's preferences.

During the past six years, both the House and Senate have

joined together to reject President Reagan's attempts to slash Social Security, to eliminate needed social-programs, and to weaken and destroy existing protections for minorities and women. The Bork nomination is an attempt to advance through the Supreme Court a political and social agenda which the President failed to achieve through the legislative process.

The Constitution has survived and flourished for two hundred years because the vast majority of Supreme Court Justices have approached cases with open minds and have interpreted the Constitution in a manner which is relevant to the social and moral issues facing modern society.

Shall we celebrate this important anniversary by stepping backwards into the future, by resurrecting antiquated notions of minorities and women, and by narrowing the scope of the equal protection, freedom of speech, and the right to privacy?

I urge the Members of this Committee and of the Senate to vote against the nomination of Robert Bork for Supreme Court Justice.

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September 9, 1987

The Honorable Joseph R. Biden, Jr., Chairman
The Honorable Strom Thurmond, Vice Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senators Biden and Thurmond:

As a teacher of law and as a citizen, I am writing to express my opposition to, and great concern over, the nomination of Robert H. Bork to the United States Supreme Court. My concern takes two parts.

First, Judge Bork's political philosophy aside, his judicial record and writings show him to be a judge who is "outcome oriented," particularly but not exclusively in cases concerning civil liberties and voting rights. His approach to constitutional interpretation, which simply disregards the existing body of Supreme Court decisional law in order to produce a desired result, demonstrates no judicial restraint at all but the most result-driven kind of judicial activism. It is clear, therefore, that it is his willingness to force the construction of the Constitution and federal statutes toward politically preferred outcomes that motivates President Reagan's nomination of him.

The body of American constitutional law developed over the years represents a precious consensus. Its balance of governmental and individual interests has been arrived at by respect for the judicial process, and through a careful adherence to both the text of the Constitution and cases interpreting it. I see no evidence that Judge Bork holds any respect for the process by which constitutional cases have been decided over the past thirty years, at least. And if his previously stated positions in opposition to many Supreme Court decisions are to be believed, I fear that his appointment to the Court will destabilize that consensus of interpretation and consent which is so delicately maintained by the present Court.

Second, and perhaps more importantly, I am alarmed at the development of a theory of American government that seems to diminish the role of the Congress and to vitiate the balance the Framers sought to create through the separation of powers among three coequal branches of government. One increasingly hears propounded the doctrine that the only proper role for Congress in

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decisions about the composition of the third branch is to approve automatically the selections presented to it by the President. According to this view, a presidential election is a mandate which gives the President a right to routine approval of all of his nominees, or at least as long as the nominee is minimally qualified under the most forgiving scrutiny, and has not conducted himself with the most egregious impropriety.

Whatever its merits may be with regard to executive branch appointments, this view would deny Congress any authority to consider the impact an appointment might have on the quality and direction of the third branch. I am not familiar with any responsible view of the Constitution that holds that it places authority for determining the composition of the Supreme Court and, thereby, the far future of American constitutional law exclusively in the Executive Branch. We should remember that we have also elected a Congress, and given it a mandate to exercise its collective judgment in urgent matters affecting the nation's future. It seems to me that we should adopt higher than minimal standards in the process of selecting our most important judges.

As the advise and consent power gives the Congress a role and a responsibility in the approval of such appointments, it concerns me that there should be so pervasive a belief that the role of Congress is subordinate to that of the President. Such a limited view of the responsibility of Congress could, in the long run, impair the fundamental balance of our system of government. I believe that the Senate has the authority and the responsibility to withhold its consent to this nomination.

Very truly yours,

Madeleine J. Wilken
Assistant Professor of Law

SUBJECT: ROBERT BORK
FOLLOWING LETTERS BEING MAILED THURSDAY 24 SEPTEMBER BY REGULAR APO U.S. POSTAL SERVICE. BEGIN TEST:
IN RE: ROBERT BORK
DEAR SENATOR BIDEN:
DEAR SENATOR THURMOND
AFTER 15 YEARS SERVICE ON THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, I HAVE AN ABIDING INTEREST IN THE QUALITY OF THOSE MEN AND WOMEN SELECTED TO SERVE IN OUR FEDERAL JUDICIARY, PARTICULARLY ON THE SUPREME COURT. I WRITE THIS LETTER TO SAY THAT I CONSIDER, AND HAVE CONSIDERED FOR MANY YEARS, ROBERT BORK TO BE UNQUESTIONABLY QUALIFIED TO SERVE AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. HE IS EMINENTLY QUALIFIED BY VIRTUE OF HIS CHARACTER, HIS INTEGRITY, HIS INDUSTRY, HIS ANALYTICAL AND DISPASSIONATE INTELLECT, HIS EXPERIENCE AS PRACTIONER, LAW PROFESSOR, SOLICITOR GENERAL, AND CIRCUIT JUDGE.
I HAVE KNOWN AND ADMIRED JUDGE BORK SINCE BEFORE HE BECAME SOLICITOR GENERAL, WHEN HE WAS A PROFESSOR AT THE YALE LAW SCHOOL. I KNEW HIM AT THAT TIME TO BE ONE OF THE MOST RESPECTED, ADMIRED, AND BEST LIKED PROFESSORS AT THE YALE LAW SCHOOL. I RELIED ON HIS ADVICE ON SEVERAL OCCASIONS IN SELECTING LAW CLERKS FROM THAT DISTINGUISHED INSTITUTION, BOTH BEFORE HE BECAME SOLICITOR GENERAL AND AFTER HE RETURNED TO YALE. IT WAS AS A COLLEAGUE ON THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DURING THE YEARS 1982, 1983, AND 1984 THAT I CAME TO KNOW JUDGE BORK BETTER. SITTING TO HEAR ORAL ARGUMENT WITH JUDGE BORK WAS A PLEASURE, FOR HIS KEEN AND ANALYTICAL MIND WAS ALWAYS AT WORK DRAWING OUT THE POINTS OF STRENGTH AND WEAKNESSES IN THE ADVERSARIES' POSITIONS. AT ALL TIMES HE DISPLAYED AN ATTITUDE OF FAIRNESS, OF EQUANIMITY, OF OBJECTIVE JUDICIAL INQUIRY, WHICH BEST EXEMPLIFIES WHAT WE CALL THE JUDICIAL TEMPERAMENT.
IN CONFERENCES AFTER ARGUMENT I ALWAYS FOUND JUDGE BORK FAIR-MINDED AND OPEN TO PERSUASION. IT IS WELL KNOWN THAT THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS CUSTOMARILY OVER THE YEARS DEALT WITH MANY CONTROVERSIAL CASES. THERE IS ALSO, I BELIEVE, A

WIDESPREAD OPINION THAT SOME OF THE JUDGES ON THAT CIRCUIT CAME TO THE BENCH WITH STRONG IDEOLOGICAL BELIEFS. WHATEVER JUDGE BORK'S PERSONAL BELIEFS, HE GAVE LESS EVIDENCE OF CARRYING ANY IDEOLOGICAL BAGGAGE WITH HIM TO THE BENCH THEN MOST OTHER JUDGES ON THAT CIRCUIT OR ANY OTHER. JUDGE BORK SEEMED ALWAYS TO BE SEEKING A DECISION BASED ON CLEARLY DEFENSIBLE LEGAL PRINCIPLES, NOT ON ANY WISH-FULFILLMENT AS TO THE RESULT.

JUDGE BORK'S APPROACH TO JUDICIAL DECISION MAKING WAS NOT PROFESSORIAL, IN THAT HE WOUND UP WITH AN EVEN-HANDED, ON THE ONE HAND AND ON THE OTHER HAND, INDECISIVE APPROACH. HIS LONG YEARS OF ANALYZING JUDICIAL DECISIONS FROM THE SCHOLAR'S POINT OF VIEW HAD GIVEN HIM A CAPACITY TO DISSECT THE VALIDITY OF OPPOSING ARGUMENTS, BUT ONCE THIS HAD BEEN ACCOMPLISHED, JUDGE BORK HAD NO DIFFICULTY IN MAKING UP HIS MIND.

JUDGE BORK'S INITIAL DECISION, HOWEVER, WAS NOT LIKE THE LAWS OF THE MEDES AND THE PERSIANS, NEVER SUBJECT TO CHANGE. I REMEMBER ONE IMPORTANT EN BANC CASE IN WHICH MY VIEW DIFFERED FROM THAT OF MY FOUR COLLEAGUES ON THE COURT WHO WERE GENERALLY CHARACTERIZED BY OUTSIDERS AS CONSERVATIVES. THERE WERE SEVERAL MAJOR CONSTITUTIONAL AND LEGAL POINTS INVOLVED IN THIS COMPLICATED CASE, AND ON ONE OF PARTICULAR IMPORTANCE TO ME JUDGE BORK HAD VOTED AT CONFERENCE IN OPPOSITION TO MY POSITION. A FEW DAYS AFTER CONFERENCE I WENT AROUND TO JUDGE BORK'S CHAMBERS TO LAY BEFORE HIM A FULL EXPOSITION OF THE REASONS BACK OF MY POSITION, AN EXPOSITION MORE COMPLETE THAN I HAD BEEN ABLE BECAUSE OF TIME RESTRICTIONS TO MAKE AT THE AFTER-ARGUMENT CONFERENCE. JUDGE BORK LISTENED QUIETLY, ASKED QUESTIONS, AND FINALLY SAID, "WELL, YOU HAVE CONVINCED ME. I WILL NOT VOTE AGAINST YOU ON THIS POINT." I WAS NOT SO FORTUNATE IN CONVINCING MY OTHER THREE CONSERVATIVE COLLEAGUES. INCIDENTALLY, IN THAT PARTICULAR CASE, IF THE RESULT HAD BEEN DETERMINED AS A POLITICAL POLICY JUDGMENT, I KNOW THAT I WOULD HAVE TAKEN A DIRECTLY OPPOSITE POSITION, AND I THINK SO WOULD HAVE JUDGE BORK. BUT THE ISSUE WAS ONE OF THE APPLICATION OF A STATUTE PASSED BY CONGRESS, AND WE BOTH WERE INTENT ON GIVING EFFECT TO THE EXPRESSED DESIRES OF THE LEGISLATURE.

I WOULD NOT IMPLY THAT JUDGE BORK AND I WERE ALWAYS IN AGREEMENT. WE WERE NOT, BUT WE RESPECTED EACH OTHER'S POSITION AS AN HONEST INTELLECTUAL JUDGMENT.

DURING THESE HEARINGS I HAVE READ JUDGE BORK CHARACTERIZED BY SOME AS RIGID, DOCTRINAIRE, AND WITH A PERSONAL IDEOLOGY WHICH HE WOULD ENDEAVOR TO PROMOTE ONCE HE WAS ELEVATED TO THE SUPREME COURT. I MUST SAY

THAT I HAVE NEVER FOUND JUDGE BORK TO ACT IN THAT MANNER. HE HAS ALWAYS SEEMED TO ME, BOTH AS A PROFESSOR AND AS A JUDGE, TO BE OPEN TO ALL RATIONAL ARGUMENTS RELEVANT TO A QUESTION, AND TO BE EAGER TO HEAR AND WEIGH THEM. I HAVE NEVER SEEN HIM SEEK TO EVADE PRECEDENT, WHETHER OF THE SUPREME COURT OR OUR OWN CIRCUIT. I'VE NEVER HEARD HIM ARGUE, EITHER ON THE COURT OR IN DISCUSSIONS OFF IT, THAT JUDGES SHOULD DISREGARD YEARS OF PRECEDENT AND TRY TO GO BACK TO AN "ORIGINAL INTENT" OF THE FRAMERS OF THE CONSTITUTION. ALTHOUGH I DON'T KNOW IF HE EVER USED THE PHRASE, THE ONLY "ORIGINAL INTENT" WHICH I BELIEVE JUDGE BORK HAS ESPOUSED IS THAT JUDGES SHOULD EXERCISE THEIR POWERS AS ORIGINALLY INTENDED, THAT IS, WITHIN LIMITS PRESCRIBED BY THE CONSTITUTION AND BY STATUTES. IN OTHER WORDS, JUDGES SHOULD BE JUDGES, AS WAS ORIGINALLY INTENDED, AND NOT ATTEMPT EITHER TO SUPERSEDE OR MODIFY LEGISLATIVE ACTION, OR TO FILL IN THE GAPS LEFT BY LEGISLATIVE INACTION, IN ACCORDANCE WITH A CURRENTLY PERCEIVED PUBLIC NEED. THIS TYPE OF JUDICIAL RESTRAINT IS ONE WHICH LEAVES POLICY DECISIONS TO THE POLITICAL BRANCHES ELECTED BY THE PEOPLE, AND ESCHEWS JUDICIAL FIAT ON POLICY MATTERS. THIS PRINCIPLE OF DEFERENCE TO THE POPULARLY ELECTED LEGISLATIVE AND EXECUTIVE BRANCHES IS NOT THE ATTITUDE OF A JUDGE DETERMINED TO ADVANCE HIS OWN IDEOLOGICAL AGENDA.

IN MY ALMOST THREE YEARS OF SERVICE WITH JUDGE BORK ON THE SAME COURT, I KNOW THAT HE ENJOYED THE HIGHEST RESPECT, ESTEEM, AND AFFECTION OF HIS COLLEAGUES. WE WERE PROUD TO HAVE A MAN OF JUDGE BORK'S ACKNOWLEDGED INTELLECT AS A MEMBER OF OUR COURT OF APPEALS. HIS CONDUCT IN DEALING WITH HIS COLLEAGUES WAS OF THE SAME HIGH CALIBER AS HIS LEGAL PROWESS; HIS FAIRNESS, THE INTEGRITY OF HIS CHARACTER, AND OF HIS DECISION-MAKING PROCESS WAS NEVER QUESTIONED.

IN MY YEARS AS LAW STUDENT (I STILL AM), LAWYER, AND JUDGE I HAVE NOT ENCOUNTERED ANYONE WITH HIGHER QUALIFICATIONS FOR THE SUPREME COURT, OR WITH MORE INHERENT PROMISE OF A TRULY BRILLIANT CAREER AT THE PINNACLE OF OUR LEGAL SYSTEM, THAN ROBERT BORK. I RESPECTFULLY URGE THE JUDICIAL COMMITTEE TO ACT FAVORABLY AND SWIFTLY TO RECOMMEND HIS CONFIRMATION BY THE FULL SENATE, AND THAT THE SENATE DOES SO CONFIRM HIM.

RESPECTFULLY,
MALCOLM R. WILKEY
AMBASSADOR

WOMEN'S
BAR ASSOCIATION
OF THE STATE OF
NEW YORK

15 East 40th Street, Suite 904-5, New York, New York 10016 (212) 889-7813

PRESS RELEASE September 14, 1987

CONTACT: Mary F. Kelly, President
914-683-6611
591-7458

WOMEN'S BAR ASSOCIATION OPPOSES BORK

The Women's Bar Association of the State of New York opposes the appointment of Judge Robert H. Bork for Associate Justice of the Supreme Court of the United States.

Judge Bork's constitutional interpretations, his lack of respect for judicial precedent and his purported adherence to original intent make him especially ill-suited for the Supreme Court, whose members must be committed to upholding the fundamental rights and liberties protected by the Constitution.

Judge Bork's positions on issues of importance such as civil rights, privacy and reproductive rights, and equal employment opportunity and affirmative action are completely antithetical to those of the Association.

A careful review of Judge Bork's writings and decisions leads us to the conclusion that equality and justice under the law for many citizens, especially for women, would be seriously jeopardized if he were appointed to the Supreme Court.

Judge Bork's philosophy is not within the mainstream of judicial thought. He is a judicial maverick who has little interest or belief in following or expanding upon settled principles of law in these areas of great significance to women.

Judge Bork's varied and distinguished career and highly developed legal skills have given him little or no insight into or sensitivity to the interplay of constitutional principles and the evolving rights of groups such as women, who have special needs for legal protection because of a history of discrimination and oppression.

We believe that the Senate has an obligation to do more then inquire into the professional credentials and character of a nominee. The Senate must assess in the broadest sense a nominee's judicial philosophy and constitutional theories to determine if the nominee has the appropriate balance and sense of justice and to assure the credibility and legitimacy of the Court itself.

President
MARY F. KELLY
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The Women's Bar Association of the State of New York* opposes the appointment of Judge Robert H. Bork for Associate Justice of the Supreme Court of the United States. Judge Bork's stated positions on issues of such importance as civil rights, privacy and reproductive rights, equal employment opportunities and conditions and affirmative action are completely antithetical to those of the Association. A careful review of Judge Bork's writings and decisions leads us to the conclusion that equality and justice for many citizens, especially for women, would be seriously jeopardized if he were appointed to the Supreme Court.

Today our vision of equality for women is closer to reality than ever before due to legislation, judicial decisions and changing social values. Of great importance have been the decisions of the Supreme Court which, regardless of its composition, has found in the Constitution the broad legal principles necessary to protect and preserve the fundamental rights of all citizens and to recognize the rights of women. Women

*The Women's Bar Association of the State of New York is a statewide women's bar association composed of sixteen chapter organizations throughout the state. It was created in part to enable women lawyers to speak with a unified voice on issues of significance to women and to promote improvement in the administration of justice.

have benefitted from the delicate balancing of interests that has resulted in the recognition of our right to fully participate in our society and like all citizens to conduct our personal lives without unwarranted governmental intrusion. That recognition and the extension of constitutional guarantees to women and other minorities are threatened by the nomination of Judge Robert H. Bork to the Supreme Court. Judge Bork's facile embrace of seemingly simple but doctrinaire solutions for complex problems endangers the basic protections guaranteed by the U.S. Constitution.

Judge Bork's positions on many issues, as well as his approach to constitutional interpretation and his apparent lack of respect for judicial precedent, are unacceptable. His purported adherence to the doctrine of original intent and to eighteenth and nineteenth century notions of the rights of citizens ignores the subsequent development of a pluralistic society. Confirmation of his nomination would seriously impair and perhaps obliterate the rights of women and other minorities under the Constitution.

A. WOMEN'S CIVIL RIGHTS UNDER THE CONSTITUTION

Judge Bork's constitutional theories are disastrous to women. We have no federal Equal Rights Amendment to unequivocally secure our constitutional rights. We must therefore rely at least in part upon equal protection and due

process clauses of the Fifth and Fourteenth Amendments for such protection.

Legal recognition of women's emerging rights as full citizens is, in an historical sense, quite recent. In 1873 the Court upheld a state statute barring women from the practice of law. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873). The language of the Bradwell Court dominated decisions about women's place in society for virtually one hundred years and thus burdened our progress towards full citizenship:

> "... The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life .... The harmony ... of interests and views which belong ... to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband ....
> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

It was not until 1971, that women were recognized as having equal rights to participate fully in American society. Reed v. Reed, 404 U.S. 71 (1971). In that landmark decision, the Supreme Court for the first time struck down a sex-discriminatory statute and held that it was denial of equal protection for a state automatically to prefer men over similarly-situated women in appointing administrators for intestate estates.

Since Reed, under the Court's "heightened scrutiny" test, gender distinctions have been struck down. The government may

treat women and men differently consistent with the requirements of equal protection only where the differential treatment is substantially related to achieving a significant governmental purpose.*

Judge Bork could well take us back to Bradwell. A cornerstone of his philosophy, so detrimental to women, is his expressed opposition to the doctrines of substantive due process and equal protection. In his oft-cited article (Bork, 47 Indiana Law Journal, "Neutral Principles and Some First Amendment Problems"), he asserts that "most of substative due process ... is improper." In his view, the equal protection clause requires procedural equality but cannot be read to do much more." Thus, despite the clear language of the Fifth and Fourteenth Amendments extending equal protection of the law to all citizens, Judge Bork

*See e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 717 (1982). See also, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (statute allowing servicemen to automatically claim wives as dependents but allowing servicewomen to claim husbands only if they provide half of his support denies equal protection); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (Social Security provision providing payment to widows, but not widowers, with children denies equal protection); Stanton v. Stanton, 421 U.S. 7 (1975) (statute providing higher age of majority for males than females so that males were entitled to parental support for a longer period of time denies equal protection); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (statute giving husband exclusive authority over community property denies equal protection).

deems that clause to be silent with respect to gender discrimination.

In several varied and significant cases involving personal liberties, Judge Bork clearly has refused to recognize substantive due process rights. For instance, Judge Bork rejected the claim that a father had any constitutionally protected interest in visitation rights with his children who were relocated to an undisclosed site under the Federal Witness Protection Program. Franz v. United States, 712 F. 2d 1428 (D.C. Cir. 1983). He has refused to recognize any "constitutional interest" in homeless men who claimed that termination of a municiple free shelter service was a denial of due process. Williams v. Barry, 708 F. 2d 789 (D.C. Cir. 1983). He has rejected the claim that gender distinctions between District of Columbia and Federal penal system rules constitute a denial of equal protection. Cosgrove v. Smith, 697 F. 2d 1125 (D.C. Cir. 1983). He has refused to recognize that damage to one's reputation is a constitutionally protected right. Mosrie v. Barry, 718 F. 2d 1151 (D.C. Cir. 1983). Judge Bork proposed that the substantial damage claims of Nisei American victims of interment camps during World War II be denied as barred by the statute of limitations. Although the majority of the Court voted to remand the plaintiffs' claim based on the "taking of property" clause of the Fifth Amendment,

Judge Bork stated:

> "This case illustrates the costs to the legal system when compassion displaces law." (dissenting opinion).

There is a common thread in these cases although they involve different parties and a variety of interests. This common thread, a restrictive reading of the equal protection and due process clauses, would affect the claims of women before the Court. Such claims for constitutional protection, many involving issues which have a serious impact on our lives, would be doomed if brought before Judge Bork for disposition. The euphemistic "neutral principles" doctrine exemplified in his written opinions and his demonstated lack of appreciation of the rights of citizens constitute a threat to constitutional integrity. To approve his nomination would signify a return to those principles that resulted in the Bradwell decision and other similar cases now discarded as aberrations in our constitutional development.

B. The Right of Privacy and Reproductive Rights

The constitutional right to privacy was first addressed by the Supreme Court in two cases decided over fifty years

ago which began to define the scope of privacy.* These decisions in effect prohibited the states from constitutionally interfering with this right in matters involving the home and family.

More recently, the Supreme Court addressed privacy issues in Griswold v. Connecticut 381 U.S. 479 (1965) where the Court struck down a state statute banning the sale or use of contraceptives, even by married couples, and Roe v. Wade, 410 U.S. 113 (1973), the decision guaranteeing a woman's right to choose an abortion. Through this right to privacy, the Supreme Court has secured for women and men alike constitutionally based freedom from state interference in areas that are crucial to the control of our own destinies. These include the right to privacy in our homes and in our relationships with family and others, and the right to reproductive freedom.

Judge Bork's views are in contrast to the expectations of the Founding Fathers expressed in the Fourth, Fifth and Ninth Amendments, namely, that government not intrude on the private lives of citizens and not search their person or

*Meyer v. Nebraska 262 U.S. 390 (1923) (state prohibition of teaching of modern foreign languages violates fundamental right of parents to control their children's education) and Pierce v. Society of Sisters 268 U.S. 510, 534-35 (1925) (state ordinance requiring children to attend public schools - "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

homes without good cause, and not dictate their private consensual conduct. Judge Bork has stated:

> "It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process, revived by the Griswold case, is and always has been an improper doctrine. *** This means that Griswold's antecedents were also wrongly decided, e.g., Meyer v. Nebraska, which struck down a statute forbidding the teaching of subjects in any language other than English; Pierce v. Society of Sisters, which set aside a statute compelling all Oregon school children to attend public schools ***." Bork, "Neutral Principles and Some First Amendment Problems", 47 Law Journal, 11 (1971).

Judge Bork has in fact indicated his hostility to any constitutional rights of privacy: Dronenberg v. Zech, 741 F. 2d 1388 (D.C. Cir. 1984). He wrote the panel decision holding that mandatory discharge of a Navy pilot because of his homosexual conduct did not violate either the constitutional right to privacy or the equal protection clause. In arriving at the decision, Judge Bork took the opportunity to take the Supreme Court to task for its prior privacy decisions, including Griswold v. Connecticut and Roe v. Wade.

He stated before the Senate in no uncertain terms that Roe v. Wade is unconstitutional:

> "I am convinced, as I think most legal scholars are, that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority." The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 310 (1982) (Statement of Robert Bork).

This statement is a perversion. One of the primary functions of the Supreme Court is to weigh state and federal legislative enactments against those rights constitutionally guaranteed to us as American citizens, not to just accept legislative enactments as fiat. When there is a conflict, it is the Constitution that is the supreme law of the land. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). The Supreme Court must ever be on guard against the abrogation of constitutional rights by overzealous governmental action. Judge Bork would have the Supreme Court reject that role in cases similar to Griswold and Roe v. Wade which may come before the court.

C. Equal Employment Opportunities and Affirmative Action

Judge Bork's record concerning equal employment opportunities and affirmative action also disqualifies him for Supreme Court appointment. Judge Bork has publicly declared on numerous occasions that he is against affirmative action.*

An example of Judge Bork's refusal to recognize the denial to women of equal employment opportunities is his decision in Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co. 741 F 2d 444 (D.C. Cir., 1984). The case involved American Cyanamid's employment practice which barred women of childbearing age from holding jobs that might involve

*See for example, R. Bork, The Unpersuasive Bakke Decision, Wall Street Journal, July 21, 1978.

exposure to certain chemicals unless they would consent to be sterilized. The women and their union challenged this policy as violating the 1970 Occupational Safety and Health Act's mandate that employers keep workplaces free from "recognized hazards" that can cause death or serious physical harm to employees.

While Judge Bork admitted that the administrative interpretations of the Act could possibly be read to prohibit the sterilization policy and to require Cynamid to correct the hazardous condition, he ignored this interpretation in ascertaining the kinds of workplace "hazards" Congress had in mind. Instead he relied upon a narrow reading of the legislative history, stating that:

> "These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policies ... The women involved in this matter were put to a most unhappy choice. But no statute redresses all grievances, and we must decide cases according to law." Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co. - 741 F 2d 444 (D.C. Cir., August 24, 1984). (emphasis supplied)

Judge Bork's antipathy to women's rights is further demonstrated in his 1985 opinion in which he concluded that sexual harassment should not be treated as sex discrimination. These views appear in his dissent from the en banc denial of rehearing in Vinson v. Taylor, 753 F. 2d 141, rehearing denied, 760 F. 2d 1330 (D.C. Cir., 1985),

affd. sub nom. Meritor Savings Bank, FSB v Vinson, 106 S. Ct. 2399 at 2404 (1986).* The Circuit Court opinion with which Judge Bork so strongly disagreed was affirmed 9 - 0 by the Supreme Court in an opinion written by Justice Rehnquist.** There Judge Bork protested the unfairness of the majority holding that evidence concerning the defendant's behavior towards other employees is relevant to whether a pattern or practice of harassment existed, while evidence concerning the plaintiff's mode of dress and/or sex life is irrelevant. Judge Bork stated that:

> "in this case, evidence was introduced suggesting the plaintiff wore provocative clothing, suffered from bizarre sexual fantasies, and often volunteered intimate details of her sex life to other employees at the bank. While hardly determinative, this evidence is relevant to the question of whether any sexual advances by her supervisor were solicited or voluntarily engaged in." Vinson v. Taylor, 760 F. 2d at 1330-1331.

This attitude resembles the outmoded and thoroughly discredited tactics used in the past in rape trials when defense counsel examined the victim's chastity. Nevertheless, Judge Bork then proceeded in Vinson to explain the "doctrinal difficulty" he finds in classifying harassment

*The Women's Bar Association of the State of New York appeared as amicus curiae for plaintiff in this case before the Supreme Court.

**Justice Rehnquist stated that "(w)ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate(s) on the basis of sex."

as sex discrimination. In his view, a woman's claim cannot accurately be called "sex discrimination" because such advances are not made solely and without exception to members of the opposite sex. He concludes that because a bisexual supervisor could conceivably use his or her authority to solicit sexual favors from male and female employees interchangeably, the cause of action is artificial.

In contrast to his position in Vinson, Judge Bork recognized and condemned the serious consequences of sexual harassment in Dronenburg v Zech, 746 F. 2d 1579 (1984). It is disturbing and rather inexplicable that Judge Bork would take such a strong approach against sexual harassment in Dronenburg, while exhibiting such difficulty in identifying the incidence of sexual harassment in Vinson. With Judge Bork on the Supreme Court, equal employment opportunities and affirmative action for women would be curtailed and hard-won gains in the employment market place could be lost.

D. Judicial Restraint

While Judge Bork advocates a policy of judical restraint in that he believes a judge's personal preferences and values should not affect a judicial decision, his own record clearly indicates otherwise. In Dronenburg, on suggestion for rehearing en banc four of Judge Bork's colleagues on the

Court of Appeals voted to vacate the decision and rehear the case "because we believe that the panel substituted its own doctrinal preferences for the constitutional principles established by the Supreme Court." The dissenters wrote:

> "We object most strongly, however, not to what the panel opinion does, but to what it fails to do. No matter what else the opinions of an intermediate court may properly include, certainly they must still apply federal law as articulated by the Supreme Court, and they must apply it in good faith. The decisions of that Court make clear that the constitutional right of privacy, whatever its genesis, is by now firmly established. An intermediate appellate judge may regret its presence, but he or she must apply it diligently. The panel opinion simply does not do so." (emphasis supplied).

When Judge Bork does exercise judicial restraint it is to the detriment of women and minorities.** In King v. Palmer, 778 F. 2d 878 (D.C. Cir. 1985), Bork authored the decision in which the Court en banc denied the motion by the United States for an extension of time within which to file an amicus curiae brief. The issue which the United States wished to address was whether Title VII affords a claim for relief for sex-based discrimination to a woman who alleges that she was denied a promotion in favor of another woman who had a sexual relationship with their supervisor.

**See, e.g., his treatise on judicial discretion in Tel-Oren v Libyan Arab Republic, 726 F. 2d 774 (D.C. Cir. 1984), an action brought by survivors of a 1978 Arab terrorist attack in Israel, and Judge Bork's rejection in Tel-Oren of the Second Circuit's decision Filartega v Pena-Irala, 630 F. 2d 876 (2d. Cir. 1980), which permitted a Latin American torture victim to sue his torturer in federal court.

Bork denied the rehearing of that issue on a narrow access question:

> "Rehearing of that issue en banc would be inappropriate because no party challenged that application of Title VII ...." King v. Palmer, supra at 883.

Judge Bork's "versatile" use of the time-honored concept of judicial restraint is idiosyncratic and may be more accurately characterized as judicial reluctance or judicial rigidity. See,e.g. Robbins et al v Reagan et al, 780 F. 2d 37 (D.C. Cir. 1985). He appears to have little understanding of or patience with the notion of jurisprudence which envisions the law as providing protection for minorities or others who are not full persons under the law. While there is a superficial appeal to avoiding substantive constitutional issues when a procedural escape can be found, dodging these issues as "political" leaves those who are least able to demand their constitutional rights without a forum in which to seek protection. Planned Parenthood Fed. of Amer., Inc. et al v Heckler, 712 F. 2d 650 (1983).

E. ADVISE AND CONSENT

We call on the Senate to exercise its constitutional mandate to "advise and consent on ... Judges of the Supreme Court" and to reject the nomination of Judge Bork. While some contend that the Senate should simply inquire into

character and professional credentials and not into the ideology of the nominee, historical precedent indicates that the Senate should consider all aspects of the nominee. The Senate has an obligation to assess in the broadest sense the possible effects of a candidate's views on the Supreme Court and on society to determine if the nominee has the balance and sense of justice so necessary to service on this nation's highest court. This inquiry is essential for the continuing credibility and legitimacy of the Court itself.

CONCLUSION

Judge Bork's constitutional theories as set forth in his scholarly writings and his decisions purport to favor "neutral principles", "judicial restraint" and "original intent", but his record makes clear that these doctrines are code political phrases not observed consistently by him but utilized to limit or deny important civil rights especially to women and minorities. Judge Bork's application of these principles lacks neutrality. His rulings clearly show that he permits his own ideological and economic views to influence his decisions.

Our analysis indicates that Judge Bork's philosophy is not within the mainstream of judicial thought. He is a judicial maverick and an eccentric theorist who has little interest or belief in following or expanding upon settled principles of law in the areas of great significance to women: civil liberties, rights of privacy and reproductive rights, equal opportunity in employment. His varied and distinguished career and highly developed legal skills have given him little or no insight into or sensitivity to the interplay of constitutional principles and the evolving rights of women and minorities who have special needs for legal protection because of a history of discrimination and oppression. The Constitution is a living document guaranteeing equality aWe need a jurist committed to that belief.

For these reasons, our Association firmly opposes the confirmation of Judge Robert H. Bork to the United States Supreme Court.

Submitted by,

The Committee to Review the Nomination of
Judge Robert H. Bork

Lenore Kramer
Madeline C. Stoller
Irene A. Sullivan
Jeanne Edna Thelwell
Sheila A. Weir
Lucia B. Whisenand

Mary F. Kelly, President

New York, New York
September, 1987

To: The Senate Judiciary Committee

From: Yale Law Students against the Confirmation of Judge Bork

Date: September 11, 1987

Enclosed is a petition signed by 320 Yale Law School students, representing approximately two-thirds of the law school student body.

The petition states that Judge Robert Bork's legal philosophy undermines constitutional guarantees, advocates a dangerous expansion of executive power, and erodes this country's tradition of judicial protection for the rights of minorities.

Yale law students feel compelled to speak out against the confirmation of Judge Bork because of his dangerous views and because of the potentially transformational nature of his appointment to the Supreme Court. As law students, particularly law students at Yale where Bork taught for many years, we believe it is our responsibility to voice our deep concern.

TESTIMONY OF DANIEL PRESS

ON BEHALF OF YOUTH FOR DEMOCRATIC ACTION

BEFORE THE SENATE JUDICIARY COMMITTEE

ON THE NOMINATION OF ROBERT BORK

YOUTH FOR DEMOCRATIC ACTION, THE YOUTH SECTION OF AMERICANS FOR DEMOCRATIC ACTION, RESPECTFULLY SUBMITS THIS STATEMENT IN OPPOSITION TO JUDGE ROBERT BORK'S NOMINATION TO THE SUPREME COURT.

AS YOUTH WE HAVE MUCH TO LOSE BY THE ACCESSION OF ROBERT BORK TO A SUPREME COURT SEAT--WE WILL BE AROUND TO SUFFER THE CONSEQUENCES. JUDICIAL APPOINTMENTS ARE THE LONGEST LASTING EFFECTS OF A PRESIDENT'S ADMINISTRATION. NOT ONLY HAVE JUDGES REMAINED ON THE BENCH FOR OVER FORTY YEARS, BUT THE EFFECT OF PRECEDENTS SET DURING A JUDGE'S TENURE GREATLY EXTENDS THE REACH OF AN ADMINISTRATION THROUGH SEVERAL GENERATIONS. AS YOUNG PEOPLE LOOKING FORWARD TO A FUTURE IN WHICH ALL CITIZENS ARE TREATED WITH DECENCY, BE THEY MALE OR FEMALE, YOUNG OR OLD, BLACK, WHITE OR ANY RACE, OF ANY SEXUAL PREFERENCE, CITIZENS OR ALIENS, WE ARE COMPELLED TO SPEAK OUT AND URGE THE SENATE NOT TO GIVE JUDGE BORK'S REACTIONARY ACTIVIST VIEWS FREE REIGN OVER OUR LIVES FOR DECADES TO COME. THE ROLE OF THE SENATE IS AN AWESOME RESPONSIBILITY. THIS IS NOT A DECISION THAT CAN BE OVERTURNED OR MODIFIED OR AMENDED ONCE THE MISTAKE IS FULLY REALIZED.

IT HAS BEEN SAID THAT WHATEVER ROBERT BORK'S PERSONAL VIEWS ARE, HE WILL DEFER TO PRECEDENT AND DECIDE CASES ON THEIR MERITS. NOTHING CAN BE FURTHER FROM THE TRUTH, AND NO MATTER WHAT SPIN HIS SUPPORTERS MIGHT PUT ON HIS VIEWS, HIS PUBLIC STATEMENTS, WRITINGS AND ACTIONS OVER THE YEARS SET HIM APART FROM MAINSTREAM AMERICA. ONE WHO HAS SO VOCIFEROUSLY OPPOSED RULINGS MOST AMERICANS TAKE FOR GRANTED CANNOT BE EASILY EXPECTED TO ACKNOWLEDGE PRECEDENT. AS THIS PANEL HAS SEEN, BORK HAS DECLARED THAT SEVERAL DECISIONS OF THE SUPREME COURT ARE UNCONSTITUTIONAL, INCLUDING ROE V. WADE, WHICH GUARANTEES A WOMAN'S RIGHT TO HAVE AN ABORTION IF SHE SO CHOOSES, AND GRISWOLD V. CONNECTICUT, WHICH

PREVENTS THE STATE FROM INVADING THE PRIVACY OF THE BEDROOM. THE DEEPER IMPLICATIONS OF ROBERT BORK'S VIEWS CAN EXTEND FAR BEYOND THE ISSUES IN THESE CASES. NOTE THAT HE REPEATEDLY USED THE WORD "UNCONSTITUTIONAL," AVOIDING THE WORDS "WRONGLY DECIDED" OR "POORLY REASONED" IN HIS ORIGINAL WRITINGS. ROBERT BORK WOULD SURELY CONCEDE THAT WHEN A JUSTICE IS CONFRONTED WITH SOMETHING WHICH HE BELIEVES TO BE UNCONSTITUTIONAL, HE IS BOUND BY HIS OATH OF OFFICE TO OVERRULE IT. THIS IS TRUE WHETHER THE OFFENDER IS A STATUTE, REGULATION, EXECUTIVE ACTION, OR JUDICIAL OPINION. THERE IS NO QUESTION ABOUT IT, IF CONFRONTED WITH THE ISSUES OF PRIVACY AND PERSONAL CHOICE, "JUSTICE" BORK WILL SURELY ATTEMPT TO REVERSE SETTLED PRECEDENT, NOT FOLLOW IT, THUS RESULTING IN THE DESTRUCTION OF RIGHTS WHICH THE MAJORITY OF AMERICANS HOLD DEAR--RIGHTS WHICH ARE GUARANTEED BY THE CONSTITUTION. A JUDGE WHO HAS SAID, "HABIT IS NOT AN ANSWER TO CONSTITUTIONAL ARGUMENT" EMBODIES THE DEFINITION OF AN ACTIVIST JUDGE--ONE WHO HAS NO RESPECT FOR PRECEDENT.

ADDITIONALLY, JUDGE BORK HAS YET TO EXERCISE A CONSISTENT JUDICIAL PHILOSOPHY EXCEPT FOR DECIDING CASES BASED UPON THE PARTIES' IDENTITY. WHEN FACED WITH CASES INVOLVING BUSINESS VERSUS GOVERNMENT, HE SIDES WITH BUSINESS, BUT IN SIMILAR CASES WITH INDIVIDUALS VERSUS THE GOVERNMENT, HE SIDES WITH THE GOVERNMENT. IN SPLIT DECISIONS OF THE D.C. CIRCUIT COURT (EXCEPT FOR BUSINESS CASES), HE SIDED WITH THE EXECUTIVE NEARLY ALL OF THE TIME. THIS IS NOT JUDICIAL RESTRAINT OR DEFERENCE, BUT PURE PARTISANSHIP. ROBERT BORK IS NOT, AS MANY OF HIS OPPONENTS HAVE TERMED HIM, AN IDEOLOGUE. HE IS WORSE. ROBERT BORK'S VIEWS SHOW HIM TO PLAY THE PARTISAN BIASED JUDGE REGARDLESS OF THE MERITS OF A CASE.

NONETHELESS, DESPITE THE FACT THAT HE BREAKS WITH HIS STATED IDEOLOGY WHEN THE PARTIES IN THE CASE DO NOT LINE UP WITH IT, A SUMMARY OF HIS POSITION ON VARIOUS ISSUES IS IN ORDER. THE LIST OF RIGHTS HE WOULD ELIMINATE IN THE NAME OF POPULAR SOVEREIGNTY--IN OTHER WORDS THE TYRANNY OF TEMPORARY MAJORITIES--READS LIKE A LIST

OF OUR MOST BASIC FREEDOMS. IN THE FIRST AMENDMENT AREA, JUDGE BORK WOULD ALLOW RESTRICTIONS ON ALL BUT POLITICAL SPEECH AND THEN ONLY WITHIN NARROW BOUNDS (HE HAS CLAIMED TO HAVE RETRACTED THAT VIEW: HOWEVER, NONE OF HIS FIRST AMENDMENT RULINGS OR HIS PUBLIC STATEMENTS OUTSIDE THIS HEARING REVEAL ANY SUCH CHANGE OF HEART). EVIDENCE FROM BORK'S STATEMENTS AND VIEWS SUGGESTS THAT HE WOULD CONDONE PUBLIC SCHOOL PRAYER AND GREATER RELIGIOUS ENTANGLEMENT WITH THE GOVERNMENT. HE WOULD ALLOW STATES TO BAN ABORTION AS WELL AS THE USE OF BIRTH CONTROL. HE WOULD ALLOW STATES, AT THEIR DISCRETION, TO STERILIZE PERSONS CONVICTED OF CRIME. HE HAS EVEN CRITICIZED BROWN V. BOARD OF EDUCATION AND OTHER CIVIL RIGHTS DECISIONS AT LENGTH, AND WOULD APPARENTLY FIND NO CONSTITUTIONAL OBJECTION TO THE SEGREGATIONIST "SEPARATE BUT EQUAL" DOCTRINE. HE ALSO HAS REFUSED TO HOLD THAT SEXUAL HARASSMENT IS ILLEGAL. CONSISTENTLY ROBERT BORK HAS DENIED PLAINTIFFS THE RIGHT TO BE HEARD IN COURT. SUCH AN ACTION IS THE DENIAL OF A BASIC PRINCIPLE OF OUR CONSTITUTIONAL DEMOCRACY.

AN EXCELLENT EXAMPLE OF BORK'S TOTAL DISREGARD FOR CONSTITUTIONAL AND STATUTORY RIGHTS AND HUMAN DIGNITY, AND HIS UNWAVERING SUPPORT FOR BIG BUSINESS, IS HIS OPINION IN THE RECENT AMERICAN CYNAMID CASE. VIEWING A YOUNG WOMAN'S CLAIM AS FRIVOLOUS, HE RULED THAT IT WAS PERFECTLY PERMISSIBLE FOR A CHEMICAL COMPANY TO REQUIRE FEMALE EMPLOYEES TO EITHER BE STERILIZED OR LOSE THEIR JOBS. WHILE SOME WOMEN CHOSE STERILIZATION DUE TO THE ECONOMIC PRESSURES OF THE REAGAN ERA, MOST REGRETTED IT LATER. BORK WAS UNWILLING TO REQUIRE THE COMPANY TO IMPLEMENT SUFFICIENT SAFETY MEASURES SINCE STERILIZATION AND SEX DISCRIMINATION ARE CHEAPER.

ROBERT BORK CLAIMS TO DENY CONSTITUTIONAL RIGHTS OUT OF DEFERENCE TO THE LEGISLATURE; HE CLAIMS THAT BY RECOGNIZING ANY RIGHT, THE RIGHT OF SOCIETY TO GOVERN ITSELF IS CONSEQUENTLY LIMITED. THIS VIEW, WHICH INCIDENTALLY IS THAT OF THE SOVIET UNION AND OTHER COUNTRIES WHICH DO NOT WANT TO BE BOUND BY THEIR CONSTITUTIONS, MAY BE ACCURATE IN IT'S SIMPLISTIC LOGIC, BUT OUR COUNTRY WAS FOUNDED AND HAS BEEN RUN ON THE IDEA THAT TEMPORARY LEGISLATIVE MAJORITIES DO NOT PROTECT OR EVEN REPRESENT THE VIEWS

OF THE PEOPLE. FOR EXAMPLE, NOT TOO LONG AGO A MAJORITY OF AMERICANS WANTED RACIAL SEGREGATION. AS AMERICANS, WE HAVE A CONSTITUTION, AND WE HAVE JUDICIAL REVIEW, AND IT IS OCCASIONALLY NECESSARY TO INVALIDATE A LAW PASSED BY THIS HONORABLE BODY OR BY STATE LEGISLATURES.

EVEN WITH THIS VIEW, HOWEVER, JUDGE BORK IS SOMETIMES WILLING AND EAGER TO DISREGARD LEGISLATIVE ENACTMENTS OR THE CLEAR INTENT BEHIND THEM: NOT WHEN INDIVIDUAL RIGHTS ARE AT STAKE, BUT WHEN THE EXECUTIVE OR BIG BUSINESS ACTS CONTRARY TO THE WILL OF CONGRESS.

ROBERT BORK HAS CONSISTENTLY HELD THAT EXECUTIVE ACTS CAN SELDOM BE CHALLENGED, ESPECIALLY IN THE AREA OF FOREIGN AFFAIRS. HE BELIEVES THE PRESIDENT'S POWERS TO BE UNLIMITED. HE TESTIFIED PREVIOUSLY TO THIS VERY COMMITTEE, ABOUT 15 YEARS AGO, THAT THE PRESIDENT WAS CONSTITUTIONALLY PERMITTED TO INVADE ANOTHER COUNTRY, THE LAWS TO THE CONTRARY PASSED BY CONGRESS NOTWITHSTANDING. HE WOULD SURELY DENY THE THOROUGH REVIEW THAT THE IRAN/CONTRA SCANDAL DEMANDS.

ROBERT BORK'S ORIGINAL AREA OF SPECIALTY IS ANTI-TRUST LAW, DESPITE HIS LIMITED UNDERSTANDING OF THE ECONOMIC AND HISTORIC PRINCIPLES UNDERLYING IT. HERE AGAIN HE SHOWS NO DEFERENCE TO LEGISLATIVE WILL OR INTENT. IT IS PATENTLY OBVIOUS THAT THE ANTI-TRUST LAWS WERE ENACTED TO PROTECT CONSUMERS FROM HIGH PRICES AND INFERIOR GOODS RESULTING FROM MONOPOLISTIC PRACTICES. JUDGE BORK WOULD LIMIT THE APPLICABILITY OF THE LAWS TO CASES OF ECONOMIC INEFFICIENCY, BOWING AGAIN TO THE INTERESTS OF BIG BUSINESS.

JUDGE BORK AND HIS SUPPORTERS URGE YOU TO CONFIRM HIM AND TO DISMISS HIS PRIOR STATEMENTS AS "PROVOCATIVE" WRITINGS OF A LAW PROFESSOR. WHILE SOME PROFESSORS SURELY DO WRITE ARTICLES INTENDING TO PROVOKE DEBATE, NO PROFESSOR IN OUR EXPERIENCE PUBLISHES IN ACADEMIC JOURNALS ARTICLES WITH WHICH HE DOES NOT AGREE. FURTHERMORE, BORK'S REPUTATION AS A SCHOLAR AND JURIST IS BASED SOLEY ON HIS ARTICLES, HIS SPEECHES, HIS POSITIONS AS SOLICITOR GENERAL, AND HIS OPINIONS ON THE COURT OF APPEALS. IF HIS ARTICLES AND SPEECHES ARE TO BE DISREGARDED AS "PROVOCATIVE,"

PURELY ACADEMIC BANTER, HIS POSITION AS SOLICITOR GENERAL DISMISSED AS THOSE OF THE ADMINISTRATION FOR WHICH HE WORKED, AND HIS APPELLATE DECISIONS TREATED AS FORCED BY BINDING PRECEDENT, THERE IS ABSOLUTELY NOTHING GIVING THIS MAN ANY BASIS FOR AN APPOINTMENT TO THE SUPREME COURT. DO HIS SUPPORTERS REALLY BELIEVE THAT A MAN SHOULD BE CONFIRMED WITH NO RECORD OF RELIABLE STATEMENTS OF HIS VIEWS?

WE IN YOUTH FOR DEMOCRATIC ACTION WANT TO HAVE A FUTURE WHICH ASSURES THAT OUR BASIC RIGHTS ARE PROTECTED--A FUTURE FREE OF EXCESSIVE INTERFERENCE BY THE GOVERNMENT AND ANY OF ITS BRANCHES IN OUR PRIVATE LIVES. WE NEITHER WANT NOR NEED A SUPREME COURT JUSTICE WHO POSSESSES A REACTIONARY IDEOLOGY DENYING AT EVERY OPPORTUNITY OUR RIGHTS IN THE NAME OF THE RIGHTS OF THE EXECUTIVE BRANCH OR GIANT CORPORATIONS. WE DO NOT WANT ROBERT BORK, AND NEITHER DO MOST AMERICANS. AS THE PRESIDENT HAS SAID IN ANOTHER CONTEXT, WE URGE YOU AND YOUR COLLEAGUES TO "JUST SAY NO!"

###

Stephen Flank, Chairperson
Youth for Democratic Action
815 Fifteenth Street, NW
Washington, DC 20005
(202)) 638-6447

Honorable Chairman, Honorable Members
Committee on the Judiciary
United States Senate
Washington, D.C. September 13, 1987

Re: Confirmation of Judge Robert H. Bork to be Associate Justice of the Supreme Court of the United States.

Mr. Chairman and Members:

I respectfully submit the following paper for your perusal and consideration and would appreciate it being included in the hearing report.

My research are excerpts from the news media, newspapers and magazines articles. Time 7/13/87 - The Battle Begins. U.S. News and World Report 7/13/87 - A New Majority moves to the Right Insight 7/20/87 - Fighting Words: Reagan says Bork - A Philosopher of Restraint for a once Activist Court, plus my comments.

Sincerely and Respectfully
John P. Zebley
507 Springer Street
Wilmington, Delaware 19805

Confirm Judge Bork - No or Yes

On July 1, 1987 President Reagan nominated Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States.

A President duly elected by the people have the constitutionally mandated power of appointment. Article 2, Section 2 of the Constitution of the United States grants the President and only him the nomination power. Alexander Hamilton explained in Federalist 76 that the President was to be the "principle agent" in the judicial process. An attempt to grant power of appointment to the Senate was debated and postponed. August 23, 1787 at the Convention formulating the Constitution.

A President has every right to choose a candidate of his own persuasion. A noted professor of Constitutional Law Herman Schwartz stated "Every president tries

to shape the U.S. Supreme Court to realize his special constitutional vision. The Federal Constitution authorizes him and his oath of office virtually obligates him to do so.

On giving the Senate (and by and with the Advise and Consent of the Senate) the power to confirm or reject a Presidential nomination the Framers surely had the "original intent" of giving the Senate equal responsibility with the President to determine the Court's membership, therefore it has not only a right but a duty to scrutinize a nominee to weight of qualification, and the usual test of competence and experience. The main idea of advise and consent is to ensure that only jurists of the highest qualification be confirmed to set on the Supreme Court of the United States

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Robert Heron Bork was born in Pittsburg in 1927. After serving two years in the Marine Corps he attended the University

of Chicago in 1947 and earned a degree from the law school, one of the most prestigious law schools in the nation. Bork practiced antitrust law in Chicago for seven years before turning to teaching and joining Yale's faculty as an antitrust specialist in 1962 at age 35. Colleques and former students describe him as friendly, decent, a stimulating teacher with complex and powerful intellect. His wit and charm made him a hit with Yale law students of all philosophical persuasions. His position at Yale was interrupted by four years of government duty as Solicitor General of the United States from 1973 - 1977. As Solicitor General under Nixon and Ford he compiled an even liberal record on employment discrimination and other civil rights issues, and served as the Justice Department chief litagator before the Supreme Court. He was appointed by President Reagan in 1981 to the U.S. Court of Appeals for the District of Columbia Circuit a tribunal second in importance to the Supreme Court that decides many of the

major legal disputes involving the Federal Government, including issues as the President's power to pocket-veto bills and the legality of demonstration at foreign embassies.

Throughout these years Robert H. Bork has built an impressive record as lawyer, professor, author and judge. His first wife a Jewish women Claire Davidson and mother of three children died of cancer in 1980. In 1982 he married Mary Ellen Pohl a former Roman Catholic nun.

What unfortunately lays ahead is a fiercely planned political Senate fight. With no chance of blocking Judge Bork's appointment based on qualification, his alleged judicial philosophy is the only base for his opponents to mount their ideological attack.

This attack began immediately from some Democrats, liberals, civil rgts, special interest and pressure groups.

With prejudgment Senator Joseph R. Biden Chairman of the Senate Judiciary Committee stated serious doubts about the nomination because Judge Bork "appears to be settled in all his views" - unless he can demonstrate that he comes to the Court more of an open mind - I would have a tough time. But Senator Biden left some maneuver room.

A careful check of reported facts concerning Judge Bork refute any rigid predictability in his life style. Socialist Eugene V. Debs was an early hero. He supported liberal Adlai Stevenson. His early libertarian views at Yale was changed by the influence of Professor Alexander Bickel a leading advocate of judicial restraint who moved from political liberalism towards traditional conservatism before his death in 1974. They had intense intellectual debates team-teaching a constitutional law seminar.

Within moments of the nomination Senator Edward M. Kennedy took a position of implacable opposition with a scathing, scurrilous attack.

"Bork's America is a land in which women would be forced into back alley abortion, blacks would set in segregated lunch counters, rogue police could break down citizens doors in midnight raids, school children could not be taught about evolution, writers and artists could be censured at the whim of the Government, The doors of the Federal Courts would be shut on the fingers of millions of citizens."

Fortunately no one appeared to follow him in this extreme language and temperment, and the press and columnist were as strong in criticism.

"Kennedy having hysterics - what bilge - what absolute rubbish - said James J. Kilpatrick

"What Senator Kennedy said should drum him out of the councils of civilized men engaged in democratic exchange. Either Senator Kennedy was drunk when he uttered these lines or he has proved as irresponsible as any demogogue in recent U.S. history" - wrote columnist William C. Buckley.

Senate majority leader Robert C. Byrd

cautioned the battle over confirmation should not become "a litmus test of party affiliation and loyalty" and delivered a clear message of disapproval of his fellow Democrats who had announced their opposition to the nomination in advance to the confirmation hearing and added he hoped that "Senators will slow down a little bit and cool it and give us all a little chance to exercise our free will. Further Senator Byrd a Judiciary Committee member said the Committee should not try to kill the nomination. I regret to see this very important nomination become a strictly partisan matter. It is in the interest of Mr Bork if a good many of us on both sides quit talking so much.

Senator Bob Packwood announced he will filibuster Bork's nomination unless Bork drops his opposition to the Supreme Courts decision on abortion, and the National Abortion Rights League vowed an all out attack and charged his confirmation means the end of legal abortion - our most basic and cherished

rights are at risk - the values of choice and freedom that lies in the heart of America.

On abortion Bork said "I am convinced as I think almost all constitutional scholars are, that Roe v. Wade is an unconstitutional decision so serious and wholly unjustified judicial usurpation of state legislative authority - a classey instance of the Court imposing its morality on local jurisdiction - abortion should be a matter of local control. In opposition to judicial imperialism, Bork at the same time opposed legislative efforts to overrule decisions as a dangerous encroachment on the Supreme Court's role in defining constitutional rights

In 1981 Senate hearings and an American Bar Association speech he criticized the reasoning in Roe v. Wade but opposed a bill that would have removed jurisdiction over abortion cases from Federal Court.

He also rejected the proposal which would have declared life begins at conception and would have defined the Fourteenth Amendment protection of a person to include the unborn. He said the question the proposed bill raised is "Whether it is proper to adopt unconstitutional

counter measures to redress unconstitutional action by the Court. I think it is not proper. The deformation of the Constitution is not properly cured by further deformation.

Benjamin J. Hooks executive director of the National Association for the Advancement of Colored People vowed to fight Bork's nomination all the way to hell freezes over, and then we'll skate across the ice, speaking at the national convention. Main criticism based on a 1963 magazine article in which Bork denounced a major civil rights proposal. The bill to bar hotels, bars, restaurants and other private businesses that serve the general public from refusing to serve black. Bork called such a bill "a dangerous departure from freedom of the individual to decide with whom he will deal" and called civil rights demonstrations "a mob coercing and disturbing" other private individuals in the exercise of their freedom. But in a 1973 Senate hearing of his nomination to be Solicitor General Bork said that he had taken "the wrong tack" in that article and had

come to believe in the ban on racial discrimination which Congress passed in 1964.

Also at the N.A.A.C.P. convention Howard Baker White House chief of staff appealed to members not to judge Bork on a "fragmented record, reflected in news clippings" and requested they consider Bork fairly by allowing all the facts to be put forward. Governor Cuomo of New York did not say whether Bork's nomination should be rejected but said that the judge should be disqualified "as a candidate if it becomes clear that he has already made up his mind on civil rights issues"

Robert H. Bork is best remembered as the man who fired Watergate special prosecutor Archibald Cox on October 20, 1973 in the Saturday Night Massacre. As Solicitor General Bork was propelled into the crisis. Cox had been hired to investigate allegations of a Nixon administration coverup of its involvement in the 1972 burglary of Democratic National Committee headquarters. Irked by a subpoena Cox issued ordering him to turn over tape recordings of White House conversations which were

upheld by a federal appellate court opinion. President Nixon ordered Attorney General Elliot L. Richardson to fire Cox. Mr. Richardson had made a commitment to the Senate not to dismiss Cox and resigned instead, as did the Justice Dept. second ranking official Deputy Attorney General William D. Ruckelhouse. That left Mr Bork the Solicitor General as acting Attorney General He fired Cox on the Presidents order, a move that came under the criticism from some in Congress. Richardson after years of silence stated that he thought Bork acted honorably "I think his performance under pressure reflects to his credit." He was holding the Justice Department together. Former Solicitor General Rex Lee also defended Bork. Nixon was going to get Cox fired if he had to go through the entire list of available personnel in the Justice Dept. Bork argued that would have crippled the department and pointed out that he not only retained the special prosecutor's staff, secured the files that the investigation could go forward, and then persuaded the President to name a successor to Cox - Leon Jaworski. The 1982 confirmation hearings fully explored Judge Bork's action in the above.

Molly Yard the new president of the National Organigation of Women called Bork a Neanderthal "Our first action will be to stop this confirmation of the Bork nomination" He's a Neanderthal, I don't quite know why he is still around.

Bork in 1985 sought to block damages for sexual harassment under the Civil Rights Act objecting to judges setting social policy he believes should be decided by elected officials.

The record will show Judge Bork is not out to destroy women's rights. In argument before the Supreme Court as Solicitor General and as a member of the Court of Appeals he never advocated or rendered a judicial decision that was less sympathetic to minority or female plaintiffs than the position eventually taken by the Supreme Court. also Bork resigned from an all-male club in New York City in 1985 after dispute arose whether the club was practicing sex discriminati

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The largest teacher union the National Educatio Association strongly opposed the Bork nomination The improvement of education seems secondary to the N.E.A main concern for political power.

Judge Bork is regarded as one of the most prominent and intellectually powerful advocate of "judicial retraint" the notion that Courts should interpret the Constitution narrowly and rarely overturn legislative enactments. The guiding principle of judicial restraint recognizes that under the Constitution it is the exclusive province of the Legislatures to enact laws and the role of the Courts to interpret them. Judges personal preference and values should not be part of their Constitutional interpretations. This theory flourished briefly during the New Deal times, then almost completely vanished in Courts and academia during the activist years of the Warren Court 1953-1969. At the present time it has gained renewed intellectual respectability and consideration

Judge Bork is also a chief exponent of the view that judges should render decisions in keeping with the intentions of the Framers of the Constitution and avoid the articulating of new rights not explicitly set out in the text. "Original intent is the only legetimate

basis for constitutional decision" Bork has written. Without it "there would be no law other than the will of the judge".

In reviewing the function of courts and the question of privacy the notion of a broad constitutional right or even any right at all is rejected by Judge Bork who finds no right of privacy in the Constitution "You cannot choose one private value over another.

In a 1984 case upholding the discharge of a Navy cryptographer for homosexual conduct Bork complained that the High Court "had provid no explanatory principle .. about what is, and what is not encompassed by the right of privacy". This decision declining to extend the right of privacy to homosexual acts is supported by other courts reaching a similar conclusion as did the Supreme Court in review of the Georgia sodomy law last year. Bork said the right of the majority to legislate morality was "the very predicate of democratic government" Judge Bork held in a broadly

worded 1984 Federal Appeals Court decision that the Constitution provides no protection for private consensual homosexual conduct and upheld the discharge of a Navy man for such conduct. Judge Bork previously as a professor at Yale in a faculty debate said "faculty should not ratify homosexuality which he said was "obviously not an unchangeable condition like race or gender"

Judge Bork's view of the role of the judiciary in governing society evolved a far more exalted view of the power of the State over individuals. This shift apparent in his changing view of the Supreme Court decision in Grisuald v. Connecticut which struck down a law making it a crime even for married couples to use contraceptives. In a 1969 article he criticized the Court's reasoning but found the outcome justifiable and suggested that "moral disapproval alone cannot be accepted as a sufficient rationale for any coercion" by the State. But in 1971 he denounced the decision as utterly specious "unprincipled and intellectually empty, calling it a typical decision of the Warren Court.

On the subject of free speech Bork mentions changing views that free speech protection be narrowly limited to political speech in a 1971 law review article outlining a tentative theory about First Amendment protection for political speech. He wrote in February 1984 issue of American Bar Association Journal. I do not think for example the First Amendment protection should only apply to speech that is explicitly political. I have long since concluded that many other forms of discourse such as moral and scientific debate are central to democratic government and deserve protection. He voiced similar views at the 1973-1982 confirmation hearings.

In writing and speeches Judge Bork has attacked the Holmes-Brandeis philosophy of free speech. Speech that advocates either "forcible overthrow of the Government" or "violation of law" "must be excluded" from protection of the First Amendment.

Judge Bork exhibits a generous view of First Amendment rights. In Allman v. Evan -a case by Allman a political scientist special-

izing in Marxist theory who had been attacked in a column by Rowland Evans and Robert Novak and sued for libel. Bork wrote "Those who step into the area of public dispute - who choose the pleasures and distractions of controversy must be willing to bear criticism, disparagements and even wounded assessments." He cited "a voiced concern that a freshening stream of libel actions which often seem as much designed to punish writers and publications, as to recover damages for real injuries may threaten the public and constitutional interests in free and frequent rough discussions. The American press is extraordinarily free and rigorous as it should be.

Bork concurring opinion in a libel case in 1984 argued that judges should provide greater protection for the press against certain libel suits even though the framers of the First Amendment apparently did not intend to curb libel suits at all, citing the judicial tradition of a continuing evolution of doctrine to serve the central purpose of the First Amendment. This challenges critics who characterize as rigid

and an achronistic Judge Bork view that the original intent of the framers is the only legitimate basis for constitutional interpretation.

Noting the growing number of libel suits Judge Bork said "Courts must act to prevent an intimidating effect on free discussion.

In an age of cynical self interest Judge Bork is a man of principle and believes deeply on two kinds of principle - one of social policy - one of constitutional interpretation - social policy - a champion of the proposition that the competitive markets are the best way to achieve consumer welfare. Essential decisions about economic matters should be made by legislators not courts. Unelected judges must stick close to the text of the Constitution least they impose arbitrary will upon the public at large. The Constitution does contain explicit protection of private property, private contracts and the more general guarantee that no person shall be deprived of life, liberty and property without due process.

On anti-trust law Judge Bork takes the most permissive position on mergers of almost and other scholar. Analysts predict that Bork would persuade fellow Justices to take a fresh look at the law of mergers.

The Court's hard nosed views on criminal law would also get a boost from Bork. He favors the death penalty - and he is skeptical of the exclusionary rule - that bars illegally seized evidence from trials. In one case Bork declared that "the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence.

On affirmative action in press statements he criticized the Burger Court's affirmative action stance and called one of its women rights ruling "putting the Equal Rights Amendment into the Constitution before it been ratified. Judges should refrain from making social policy he said.

A bare majority of Justices held the Constitution barring government "establishment of religion" ruled out school prayer and federal aid to parochial school students. Bork is considered likely to join Chief Justice Rehnquist's view that the Constitution's framers intent was to prevent recognition that was official only to a particular group or denomination and not policies benefitting religion in general - (more prohibiting the free exercise). Bork's views would give a quick test in a pending challenge to "moments of silence" in New Jersey classrooms

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Writing for a Three Judge Federal Appellate Panel ruled that television reporters who run for office obligate their stations to provide equal time for opposing candidates, and also rejected a broad challenge to the constitutionality of the law that generally required broadcasters to give equal time to opposing political candidates noting that a 1969 Supreme Court ruling had upheld the law. While he had criticized the reasoning of the 1969 precedent Bork said that lower

courts remained bound by it, unless the Supreme Court overruled it. Red Lion Broadcasting Co v. F.C.C. The Court held that the equal time rule and the Federal Communication Commission fairness doctrine which requires radio and television broadcasters to present opposing views on controversial issue of public importance did not violate the First Amendment rights of broadcasters. The Court said that the First Amendment rights of broadcasters were less extensive than those of publishers because the scarcity of outlets on the broadcast spectrum justified regulations to provide viewers and listeners with a variety of viewpoints. The Court has held that it would violate the First Amendment to impose similar "fairness" requirements on newspapers.

In an opinion last September Judge Bork said the scarcity rationale for distinguishing between broadcasters and newspapers had produced "strained reasoning and artificial results. Noting that many "markets" have a far greater number of broadcasting stations than than newspapers and suggested that the Supreme Court should perhaps reconsider the Red Lion decision.

The "fairness doctrine" has long been opposed by broadcasters as overregulations in violation of their First Amendment rights. A key step in its demise was a 2-1 decision in September 1986 written by Judge Bork for the Federal Appeals Court for the District of Columbia, that the "doctrine" was not required by any act of Congress. That meant the F.C.C was free to abolish the doctrine which it did.

Judge Bork holds to the unescapable aspect of Presidential Executive power recognized by an unbroken line of authority since James Madison. This principle survived Federal District Judge Gerhard A Gesells carefully qualified opinion on the subject.

Judge Bork differs from President Reagan on a balanced budget. An amendment would do more harm than good by giving judges to much power over fiscal policy, and that in any event Congress would find ways to evade spending limits.

Liberals understandingly always want a liberal Court. They have the theory that the Court philosophical balance should never change Senator Biden claims "The balance question is properly considered when the country and the courts are divided and a determined President has the greatest opportunity to remake the court in his own image".

Senator Simpson termed the call for balancing an extraordinary red herring saying "nothing requires or suggest anything about balance in the historical record of the Court."

It is quite apparent if the Court always had the same balance it could never change bad decisions. Plessy v. Ferguson which in 1896 upheld school segregation could not have been overruled by Brown v. Board of Education.

It so widely assumed if Judge Bork be seated he would tip the balance of the Supreme Court for years to come. It is alleged that it would roll back the clock - move the Court in a direction it was 20 to 25 years ago.

Let us note some epochs in the history of the Supreme Court. During the 1930s a mostly

conservative Supreme Court struck down much of Franklin D Roosevelt's New Deal regulatory legislation on the grounds that it interfered with a broadly defined notion of "substantive due process" giving businesses a constitutional right to conduct themselves free of government interference.

Under Warren the Court its attention focussed on personal rather than economic liberty, and on state rather than on federal legislation established complex procedural rules for criminal cases - the exclusion any rule - the Miranda rule - The Court also struck down the electoral districting systems of many states to establish "the one man, one vote" rule, gave procedural rights to welfare recipients, weakened state restrictions on pornography, forbade prayer in public schools, and recognized a seemingly open ended "fundamental" right to privacy in sexual matters.

The activist trend continued under Chief Justice Warren Burger. The Supreme Court approved Court ordered busing to remedy segregation in schools, and to a limited

extent racial preferences in hiring, promotion, and school admission. It extended free speech protection to commercial advertising and established a special constitutional status for women that resulted in the invalidation of numerous state and federal laws. In its most controversial decision the Burger Court ruled in 1973 by 6-3 in Roe v. Wade to expand the right to privacy to include a women's right to an abortion. This ruling voided abortion restrictions in all 50 states.

It is interesting to note that Lloyd N. Cutler a liberal Democrat, an advocate of civil rights, and former counsel to President Carter although refraining from taking a stand on either side of Judge Bork's nomination, instead gave a personal evaluation in "Saving Bork from both Friend and Enemies" N.Y. Times July 16, 1987 He wrote that - Judge Bork is neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues. He said ~~his~~

his views was based on long acquaintance and study of the nominee's public articles and opinions, and predicted that if confirmed by the Senate, Judge Bork would be closer to the middle than the right and not far from the Justice he would replace. One can fairly say that the confirmation is as much endangered by one extreme as the other. The essence of Judge Bork's judicial philosophy is self restraint - All Justices subscribe nominally to that philosophy, but few rigorously observe it Justices Oliver Wendell Holmes, Louis D. Brandeis, Felix Frankfurter, Potter Stewart and Lewis F. Powell Jr. were among those few, and Judge Bork's articles and opinions confirm that he would be another - wrote Cutler.

Justice John Paul Stevens in unusual public remarks praised Judge Bork's qualifications and implicitly rejected the portrait of a rigid, right-wing ideologue. He likened Bork's constitutional philosophy as expressed in one 1984 opinion to that of himself and two other moderate centrists on the Court Justice Lewis F Powell Jr who retired June 26th and Justice Potter Stewart who retired in 1981 and since died.

I personally regard him as a very well qualified candidate and one who will be a very welcome addition to the Court. There are many many reasons that lead me to that conclusion.

Former U.S. Solicitor General Rex Lee said Bob Bork is probably the most qualified person to be a Supreme Court Justice from the standpoint of intellect, temperment and training

Bork is a 4 star appointment says the dean of the University of Chicago law school Geoffrey Stone. Stone a self described liberal said "You usually don't get anyone with any where near his credentials.

Former Chief Justice Warren Burger said he could not recall a nominee better qualified than Judge Bork... If its proper to consider a nominee's ideology "They shouldn't have confirmed me.

In conclusion - Judge Bork is hardly an unknown quantity in the Senate - In 1982 the Senate confirmed him unanimously as a Judge on the Circuit Court of Appeals for the District of Columbia Circuit. He was in fact so well qualified they found that not one Senator even requested

a roll call. The 1982 confirmation hearing also fully explored Judge Bork's role as Solicitor General in the 1973 firing of Watergate special prosecutor Archibald Cox. Had members of the Senate any reservations about Judge Bork in 1982 surely at least one should have voted against him. It is important to note that not 1 of the 100 majority opinions written by Judge Bork or even 1 of the 300 or so decision where he has joined the majority has been overturned on appeal. He has written 9 dissenting opinions, and 7 partially dissenting opinions. The reasoning of several of these dissents was adopted by the Supreme Court when it reversed the opinions with which he expressed disagreement. It seems incredulous that the difference of 5 years should transform Judge Bork unanimously confirmed with the above record as a Judge suddenly into a right-wing extremist and ideologue. Judges once seated may be above politics The executive and legislative branches never are. Whether Senators accept or reject Judge Bork it will still be and properly political. It is something for the electorate, the real as well as the potential electorate to consider next election day.

The word "ideologue" seems an inaccurate and unfair label. I would have a cause for extreme concern if Judge Bork were an inflexible, closed minded and self righteous Judge looking to further an agenda of his own choosing. His legal conclusions appear based on specific issues of his moral general philosophy of constitutional law and adjudication and not from personal likes or dislikes.

I personally feel this controversial Judge to be especially well qualified for Associate Justice of the Supreme Court of the United States having the proper judicial temperment, intellectual power and a breadth of legal experience.

Respectfully submitted
John P. Zebley
507 Springer Street
Wilmington, Delaware 19805

September 13, 1987

100TH CONGRESS
1st Session

SENATE

EXEC. REPT.
100-7

NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

together with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

OCTOBER 13, 1987.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

19-119

WASHINGTON : 1987

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INTRODUCTION

"We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

Our nation has flourished for 200 years under the Constitution and the tradition of individual liberty in which it was conceived. When throughout our history that tradition has been challenged, the Constitution and the ideals it embodies have emerged victorious. The nation has grown stronger with each victory.

The Supreme Court has served as the last bulwark of protection for our rights when the government has unduly intruded into the realm of individual liberty. So it was for our parents and grandparents; and in our complex and often intrusive modern society, the Court must be ever more vigilant to protect the liberty of our children and grandchildren.

For that task, we need Supreme Court justices who understand that "the spirit and grandeur of the Constitution lies in its magnificent abstractions and its deliberate ambiguities," and who are prepared for the profound work of applying that document to the "untidiness of the human condition." (Testimony of Judge Shirley Hufstedler, Comm. Print Draft, Vol. 2, at 921, 923.) We need justices who understand and accept that

> "[j]ustice," "liberty," "welfare," "tranquility," "due process," "property," "just compensation" are neither neutral nor static concepts or principles. They are words of passion. They are words of dedication. They are words that cannot be drained of their emotional content and carry any meaning. None can be cabined without destroying the soul of the Constitution and its capacity to encompass changes in time, place, and circumstances. (Comm. Print Draft, Vol. 2, at 923.)

The committee has concluded that the judicial philosophy and approach that Robert H. Bork would bring to the Court are inadequate for these great responsibilities. His jurisprudence fails to incorporate the ennobling concepts of the Constitution. It is thus fundamentally at odds with the express understanding of the Framers and with the history of the Supreme Court in building our tradition of constitutionalism. By depriving the Constitution of its spirit, that philosophy threatens the vitality of our tradition. Above all, our nation demands that the Supreme Court exercise wisdom and

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statesmanship in mediating conflicts spurred by growth and change in a dynamic society.

This report canvasses the record of significant issues that were developed at the committee hearings. All Senators subscribing to this report concur that each of these issues was relevant to some members of the committee in reaching the recommendation that the Senate not consent to this nomination. But, individual Senators may not agree with the conclusions drawn in every section.

100TH CONGRESS
1st Session

SENATE

EXEC. REPT.
100–7

NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

OCTOBER 13, 1987.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

The Committee on the Judiciary, to which was referred the nomination of Judge Robert H. Bork to be an Associate Justice of the United States Supreme Court, having considered the same reports unfavorably thereon, a quorum being present, by a vote of nine yeas and five nays, with the recommendation that the nomination be rejected.

PART ONE: BACKGROUND AND QUALIFICATIONS

I. BACKGROUND

The committee received the President's nomination of Judge Robert H. Bork to be an Associate Justice of the United States Supreme Court on July 7, 1987. The hearings on Judge Bork's nomination were held on September 15, 16, 17, 18, 19, 21, 22, 23, 25, 28, 29, and 30. The nominee completed 30 hours of testimony, extending over four-and-a-half days, before the committee. The 12 days of hearings lasted approximately 87 hours, and during that time the committee heard from 112 witnesses.

The testimony of public witnesses was organized so as to encourage as full and complete a discussion as possible of the various subjects relevant to this nomination. An effort was made to bring before the committee some of this nation's most eminent legal scholars and most distinguished lawyers and public servants to testify both in favor of and against the nominee. Where appropriate, witnesses testified in panels organized by subject matter, facilitating thorough questioning and debate of each issue. The committee was particularly privileged to receive testimony from President Gerald Ford, former Chief Justice Warren Burger and five former Attorneys General of the United States. Set forth as Appendix I to this Report is a complete witness list for these hearings, organized by date of appearance and briefly indicating biographical data where appropriate.

The committee carefully and thoroughly scrutinized the nominee's qualifications and credentials, his five-year record as a Judge on the United States Court of Appeals for the District of Columbia Circuit, and his extensive written and spoken record. On October 6, a quorum being present, the committee took two roll call votes. The first vote was on a motion to report the nomination with a favorable recommendation. The committee voted, 9 to 5, against that motion:

NAYS	AYES
Mr. Biden	Mr. Thurmond
Mr. Kennedy	Mr. Hatch
Mr. Byrd	Mr. Simpson
Mr. Metzenbaum	Mr. Grassley
Mr. DeConcini	Mr. Humphrey
Mr. Leahy	
Mr. Heflin	
Mr. Simon	
Mr. Specter	

The second roll call vote was on a motion to report the nomination with a negative recommendation. The committee voted, 9 to 5, in favor of the motion:

AYES	NAYS
Mr. Biden	Mr. Thurmond
Mr. Kennedy	Mr. Hatch
Mr. Byrd	Mr. Simpson
Mr. Metzenbaum	Mr. Grassley
Mr. DeConcini	Mr. Humphrey
Mr. Leahy	
Mr. Heflin	
Mr. Simon	
Mr. Specter	

II. THE NOMINEE

Judge Bork was born on March 1, 1927, in Pittsburgh. He attended the University of Pittsburgh for a short time and then enlisted in the United States Marine Corps in 1945. He served until 1946, when he was honorably discharged. Following military service, he attended the University of Chicago, where he received a Bachelor of Arts degree. During his first year at the University of Chicago Law School, Judge Bork enlisted in the Marine Corps Reserves. He was called back to duty in 1950 and served in active military duty until 1952. He received his law degree from the University of Chicago Law School in 1953. From 1953–1954, he was a research associate with the University of Chicago Law School's Law and Economics Project.

From 1954–1962, the nominee engaged in the private practice of law. He practiced first with the New York firm of Wilkie, Owen, Farr, Gallagher & Watson and then later was an associate and partner at the Chicago firm of Kirkland, Ellis, Hodson, Chaffetz & Masters.

From 1962–1973, the nominee was a member of the faculty of the Yale Law School. He was an associate professor from 1962–1965 and a full professor from 1965–1973.

From 1973–1977, Judge Bork served as Solicitor General of the United States. In this capacity, he argued a number of cases before the Supreme Court. Judge Bork briefly served as Acting Attorney General from 1973–1974.

In 1977, Judge Bork returned to the faculty of the Yale Law School. He served as the Chancellor Kent Professor of Law from 1977–1979 and as the Alexander Bickel Professor of Public Law from 1979–1981. His book, *The Antitrust Paradox: A Policy At War With Itself,* was published in 1978.

In 1981, Judge Bork returned to private practice as a partner in Kirkland & Ellis, working out of the Washington office.

From 1982 to the present, Judge Bork has served as a judge on the U.S. Court of Appeals for the District of Columbia Circuit.

III. THE AMERICAN BAR ASSOCIATION'S EVALUATION

For the first time since the American Bar Association's (ABA) Standing Committee on Federal Judiciary began evaluating Su-

preme Court nominees, a substantial minority of the Standing Committee found a Supreme Court nominee to be "not qualified" to serve on the nation's highest court. In evaluating the nomination of Judge Bork, Harold R. Tyler, Jr., Chairman of the Standing Committee (and a former federal district court judge), testified that "ten members voted well-qualified; one, not opposed, and four, not qualified." (Comm. Print Draft, Vol. 1, at 902.)

Prior to the Bork nomination, the only time that the ABA Standing Committee did not initially return a unanimously well-qualified evaluation was in 1971, when Chief Justice Rehnquist was first appointed to the Court. In that case, while the Standing Committee was unanimously of the view that Chief Justice Rehnquist was "qualified" for the appointment, three members found that his qualifications did not establish his eligibility for the committee's highest rating and, therefore, said that they were "not opposed" to his confirmation.

When Judge Clement F. Haynsworth, Jr. was nominated to the Court in 1969, the Standing Committee's initial unanimous evaluation was that he was "qualified professionally;" this was later changed to an 8 to 4 vote after evidence came to light of an alleged financial conflict of interest. Even Judge G. Harrold Carswell (nominated in 1970), whose professional competence was an issue before the Senate, received unanimous approval by the ABA. The nominations of Judge Haynsworth and Judge Carswell were rejected by the Senate.

No Supreme Court nominee who has received even a single "Not Qualified" vote from the Standing Committee has ever been confirmed by the Senate.

A. The ABA Standing Committee Uses Three Categories to Rate Supreme Court Nominees

The Standing Committee now uses three categories to describe its evaluations of Supreme Court nominees. "Well qualified" is reserved for those nominees who "meet the highest standards of professional competence, judicial temperament and integrity. . . . The persons in this category must be among the best available for appointment to the Supreme Court." "Not opposed" is the second category, applying to persons who, while "minimally qualified," are not among the best available for appointment and are not endorsed by the committee. The third category is "not qualified"—those who are not qualified "with respect to professional qualifications" for appointment to the Supreme Court. This rating system is somewhat different from that used for federal district court and appellate court judgeships.

The Standing Committee rates candidates on the basis of a limited set of criteria. As stated in a September 21 letter from Judge Tyler to Chairman Biden: "The Committee's evaluation of Judge Bork is based upon its investigation of his professional competence, judicial temperament and integrity. Consistent with its longstanding tradition, the Committee's investigation did not cover Judge Bork's political or ideological philosophy except to the extent that such matters might bear on judicial temperament or integrity." (Comm. Print Draft, Vol. 1, at 954.) The handbook of the ABA

Standing Committee directs its members, when investigating temperament, to consider the prospective nominee's "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice, among other factors."

In a September 4 letter to Senator Metzenbaum, Judge Tyler advised that because of the limited scope of the Standing Committee's evaluation, "this committee should not specifically recommend to the Senate how it should vote on confirmation of a given nominee," and that although some might construe a "well qualified" rating as "equivalent to a firm recommendation to the Senate," such a construction "would not be justified." (Comm. Print Draft, Vol. 1, at 970.)

B. The ABA Conducted an Extensive Investigation of Judge Bork

The 15 members of the ABA Standing Committee conducted an extensive investigation of Judge Bork, including interviews with five members of the Supreme Court, with many of his colleagues on the D.C. Circuit Court of Appeals, and with approximately 170 other federal and state court judges, including female and minority members of the bench, throughout the United States. The ABA Committee also interviewed approximately 150 practicing attorneys, 79 law school deans and professors, 11 of Judge Bork's former law clerks and a number of present or former lawyers who served under Judge Bork in the office of the Solicitor General when he headed that office.

Judge Bork's opinions were examined by the dean and 10 professors at the University of Michigan Law School. The Standing Committee reviewed and considered written submissions from a number of institutions and groups, including the White House, the Lawyers Committee for Civil Rights Under Law, the past chairmen of the Antitrust Section of the ABA, the NAACP Legal Defense and Education Fund, Inc., the American Civil Liberties Union, the National Women's Law Center, Public Citizen Litigation Group and People for the American Way.

Finally, Judge Bork was personally interviewed on two separate occasions, for a total of about six hours, by three members of the ABA Standing Committee. A second interview was unprecedented for a Supreme Court nominee, but was considered necessary because of "some additional questions" that arose from discussion among members of the ABA Committee and submissions of various groups. (Comm. Print Draft, Vol. 1, at 903.)

C. The ABA Committee Was Split in Its Evaluation of Judge Bork

Based on the criteria identified above, a majority of the ABA Committee concluded that Judge Bork is "well qualified" for appointment to the Supreme Court. Five members of the committee concluded that Judge Bork did not merit such a rating because of their concerns about his judicial temperament. Such concerns were related to Judge Bork's "compassion, open-mindedness, his sensitivity to the rights of women and minority persons or groups and comparatively extreme views respecting constitutional principles or their application, particularly within the ambit of the Fourteenth Amendment." (Comm. Print Draft, Vol. 1, at 959.) In addition, one

dissenting member also expressed reservations about what that member termed inconsistent and possibly misleading recollections by Judge Bork of the events surrounding the resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus during the Watergate episode.

The interviews of Judge Bork's colleagues, other federal and state court judges, practicing attorneys and academics revealed praise for the nominee's intellectual and professional attainments and admiration for his experience and analytical abilities. Those persons who considered Judge Bork either highly qualified or qualified praised his integrity, scholarship and professional competence. A number of those interviewed expressed concerns, however, about the nominee's judicial temperament, most often relating to doubts about his compassion, open-mindedness and sensitivity to women and minorities. (Comm. Print Draft, Vol. 1, at 956–57.)

The Standing Committee also reviewed allegations made by Judge James F. Gordon, a senior federal district court judge from Kentucky, relating to preparation of the written opinion in *Vander Jagt* v. *O'Neill,* 699 F.2d 1166 (D.C. Cir.), *cert. denied,* 464 U.S. in which Judge Gordon sat by designation on the D.C. Circuit. Judge Gordon had written a letter to Chairman Biden, dated August 24, 1987, which was transmitted to the ABA Standing Committee. The letter alleged that Judge Bork had wrongfully attempted to make his view of the case the majority opinion, when the other two judges on the panel disagreed with his reasoning. *(See generally* Part Three, Section VIII, *infra.)* Chairman Tyler testified that, given the circumstances, the Standing Committee had felt that this "was [not] something that should weigh for or against [Judge Bork] at all." (Comm. Print Draft, Vol. 1, at 910.)

IV. THE LEGAL COMMUNITY'S EVALUATION OF JUDGE BORK

A. The Negative Evaluation of Judge Bork by the Academic Community Is Unprecedented

The committee has received letters from approximately 2,000 members of the legal academic community in opposition to Judge Bork's confirmation. Simply put, the extent of this opposition is unprecedented. Prior to this nomination, the maximum number of law professors voicing their disapproval of a judicial nominee had been 300, in connection with the nomination of Judge Carswell.

The committee received letters signed by 1,925 law professors opposing Judge Bork's confirmation. (Comm. Print Draft, Vol. 3, at 1899.) This figure represents nearly 40 percent of the full-time law faculty at American Bar Association-accredited law schools in 47 states and the District of Columbia. (There are no ABA-accredited law schools in Alaska, Nevada and Rhode Island.) The signatories to these letters also represent faculty from 90 percent of the ABA-accredited law schools (153 schools out of a total of 172).

The committee also received a letter signed by 32 law school deans.[1] (Comm. Print Draft, Vol. 2, at 91–97.) This letter stated:

> Judge Bork has developed and repeatedly expressed a comprehensive and fixed view of the Constitution that is at odds with most of the pivotal decisions protecting civil rights and liberties that the Supreme Court has rendered over the past four decades. . . . If Judge Bork were to be confirmed, his vote could prove determinative in turning the clock back to an era when constitutional rights and liberties, and the role of the judiciary in protecting them, were viewed in a much more restrictive way. (Comm. Print Draft, Vol. 2, at 92.)

Finally, the committee received a letter from 71 constitutional law professors, the text of which was identical to that signed by the law school deans. Three persons signed both this letter and the deans' letter. (Comm. Print Draft, Vol. 2, at 80–90.)

B. Opposition to Judge Bork's Confirmation Also Came from Other Professional Legal Groups

A large number of practicing lawyers and organized bar groups have also expressed their opposition to Judge Bork's confirmation. One such group is the Association of the Bar of the City of New York, which, through its Excutive Committee, testified against the confirmation. The Association, which is one of the oldest and most prestigious bar organizations in the country and which at present has almost 17,000 members, stated that Judge Bork's "fundamental judicial philosophy . . . appears to this Association to run counter to many of the fundamental rights and liberties protected by the Constitution." (Comm. Print Draft, Vol. 2, at 845.)

The Committee also heard testimony from John Clay, representing Lawyers for the Judiciary, a Chicago-based organization with more than 700 members, which opposes Judge Bork's confirmation. The statement of Lawyers for the Judiciary concludes that "Judge Bork's philosophy . . . puts him outside the mainstream of constitutional jurisprudence and would deny what our citizens regard as their basic, fundamental rights." (Comm. Print Draft, Vol. 3, at 2212.)

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[1] In a September 28 letter to the Chairman and ranking Member, James Vorenberg, Dean of the Harvard Law School, stated that while he was opposed to Judge Bork's confirmation, he did not intend to be listed as a signatory to the letter.

PART TWO: THE CONSTITUTION'S UNENUMERATED RIGHTS

I. JUDGE BORK'S VIEW OF THE CONSTITUTION DISREGARDS THIS COUNTRY'S TRADITION OF HUMAN DIGNITY, LIBERTY AND UNENUMERATED RIGHTS

The Bork hearings opened on the eve of the celebration of the 200th anniversary of our Constitution. The hearings proved to be about that Constitution, not just about a Supreme Court nominee.

The hearings reaffirmed what many understand to be a core principle upon which this nation was founded: Our Constitution recognizes inalienable rights and is not simply a grant of rights by the majority. Chairman Biden's opening statement identified these fundamental principles:

> I believe all Americans are born with certain inalienable rights. As a child of God, I believe my rights are not derived from the Constitution. My rights are not derived from any government. My rights are not derived from any majority. My rights are because I exist. They were given to me and each of my fellow citizens by our Creator, and they represent the essence of human dignity. (Comm. Print Draft, Vol. 1, at 68.)

This image of human dignity has been associated throughout our history with the idea that the Constitution recognizes "unenumerated rights." These are rights beyond those specifically mentioned in the Constitution itself, rights that are affirmed by the grand open-ended phrases of the document: "liberty," "due process," "equal protection of the laws" and others. The sober responsibility of preserving the meaning and content of these rights has fallen to the judiciary, and especially to the Supreme Court.

Against this understanding of the Constitution, and of human dignity, Judge Bork offers an alternative vision—that Americans have no rights against government, except those specifically enumerated in the Constitution. The contrast was stated cogently by Professor Philip Kurland:

> I think it makes all the difference in the world whether you start with the notion that the people have all the liberties except those that are specifically taken away from them, or you start with the notion, as I think Judge Bork now has, that they have no liberties except those which are granted to them. (Comm. Print Draft, Vol. 3, at 1391.)

As Professor Kurland concluded: "I do not know of anything more fundamental in our Constitution" than the idea that the people have all the liberties except those specifically relinquished.

A. Judge Bork's Judicial Philosophy Does Not Recognize the Concept of Unenumerated Rights and Liberties

1. Judge Bork's Core Theory

Judge Bork has consistently described his constitutional theory as "intentionalist," meaning that he considers it the function of a judge to determine the intentions of the body that wrote the laws and to apply those intentions to the case brought before the court. Interpreting law is thus a matter of discerning the original intent of those responsible for making it.

Judge Bork reaffirmed this view in his opening statement before the committee:

> The judge's authority derives entirely from the fact that he is applying the law and not his own personal values . . . . How should a judge go about finding the law? The only legitimate way is by attempting to discern what those who made the law intended. The intentions of the lawmakers govern, whether the lawmakers are the Congress of the United States enacting a statute or those who ratified our Constitution and its various amendments. (Comm. Print Draft, Vol. 1, at 78–79.)

At the end of four and one-half days of testimony, Judge Bork confirmed that he had not altered his basic philosophy:

> [T]here is much in my earlier writings—most particularly, my views on the proper role of judges and the need for faithful adherence to the text and the discernible intentions of the ratifiers of the Constitution and statutes—that I subscribe to just as fully today as I did before. . . . If the Members of the Committee are looking, as you have said you are, for predictability, it is certainly predictable that I will adhere to my judicial philosophy as I have described it in these hearings and elsewhere. (Comm. Print Draft, Vol. 1, at 721.) [2]

2. Judge Bork's Judicial Philosophy Leads Him to Conclude that the Constitution "Specified Certain Liberties and Allocates All Else to Democratic Processes"

The implications of Judge Bork's theory of original intent are quite clear from his writings, speeches and testimony. The most dramatic consequence of his theory is the rejection of the concept of unenumerated rights and liberties. He has consistently held to the view, both before and during the hearings, that the Constitution should not be read as recognizing an individual right unless

---

[2] Judge Bork did not always rely on orginal intent and the text of the Constitution for the resolution of constitutional controversies. As he wrote in 1968:

> The text of the Constitution, as anyone experienced with words might expect, is least precise where it is most important. Like the Ten Commandments, the Constitution enshrines profound values, but necessarily omits the minor premises required to apply them. . . . History can be of considerable help, but it tells us much too little about the specific intentions of the men who framed, adopted, and ratified the great clauses. The record is incomplete, the men involved had vague or even conflicting intentions, and no one foresaw or could have foreseen, the disputes that changing social conditions and outlooks would bring before the Court. . . . ("The Supreme Court Needs a New Philosophy," Fortune 138, 141, (Dec. 1968).

that right can be specifically found in a particular provision of the document.[3]

In particular, Judge Bork has repeatedly rejected the well-established line of Supreme Court decisions holding that the "liberty" clauses of the Fifth and Fourteenth Amendments protect against governmental invasion of a person's substantive personal liberty and privacy. He has said, for example, that:

> [T]he choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specifiy the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. ("Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* 1, 8 (1971).)

Judge Bork has also disregarded the text of the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In Judge Bork's view, while there are alternative explanations for the Amendment,

> if it ultimately turns out that no plausible interpretation can be given, the only recourse for a judge is to refrain from inventing meanings and **ignore the provision**, as was the practice until recently. ("Interpretation of the Constitution," 1984 Justice Lester W. Roth Lecture, University of So California, October 25, 1984, at 16; emphasis added.)[4]

This suggested disregard for the Amendment is consistent with Judge Bork's general recommendation about a judge's role "when his studies leave him unpersuaded that he understands the core of what the Framers intended" with respect to a particular constitutional provision:

> [The judge] must treat [the provision] as nonexistent, since, in terms of expression of the framers' will, it is nonexistent. . . . When the meaning of a provision . . . is unknown, the judge has in effect nothing more than a water blot on the document before him. He cannot read it; any meaning he assigns to it is no more than judicial invention

---

[3] In response to a question by Senator DeConcini, Judge Bork testified that he believed there were "some rights that are not enumerated but are found because of the structure of the Constitution and government." (Comm. Print Draft, Vol. 1, at 224.) These "structural" rights, which "the individual [has] for the sake of a governmental process that the Constitution outlines" ("Neutral Principles" at 17), are wholly distinct from "unenumerated rights" as that phrase is ordinarily used. These latter rights preserve individual liberties in the face of government's desire to override them, and are rights retained by the people, rather than rights given to them by the majority. It is the tradition recognizing these rights that is the subject of this Section.

[4] Judge Bork did not always believe that the Ninth Amendment should be ignored. In 1968, he argued:

> Legitimate activism requires, first of all, a warrant for the court to move beyond the range of substantive rights that can be derived from the traditional sources of constitutional law. The case for locating this warrant in the long-ignored 9th Amendment was persuasively made by Justice Arthur Goldberg [in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965)]. . . . This seems to mean that the Bill of Rights is an incomplete, open-ended document, and that the work of completion is, at least, in major part, a task for the Supreme Court. There is some historical evidence that this is substantially what Madison intended. ("The Supreme Court Needs a New Philosophy" at 170.)

of a constitutional prohibition; and his proper course is to ignore it. (*Id.* at 11–12; emphasis added.) [5]

According to Judge Bork, "[t]he Constitution specified certain liberties and allocates all else to democratic processes." ("Judicial Review and Democracy," *Society,* Nov./Dec. 1986 at 7; emphasis added.) Thus, under Judge Bork's view, the court interferes with the "democratic process" whenever it recognizes a right that is not specified in the Constitution. As he said in a 1985 speech and reaffirmed at the hearings, the Constitution is essentially a zero-sum system, in which rights for some necessarily come only at the expense of others:

> Senator SIMON. One point, at a speech at Berkeley in 1985, you say . . .' [When] a court adds to one person's constitutional rights it subtracts from the rights of others.' Do you believe that is always true?
>
> Judge BORK. **Yes, Senator. I think it's a matter of plain arithmetic.** . . .
>
> Senator SIMON. I have long thought it is kind of fundamental in our society, that when you expand the liberty of any of us, you expand the liberty of all of us.
>
> Judge BORK. I think, Senator, that is not correct. (Comm. Print Draft, Vol. 1, at 289, 421; emphasis added.)

B. This Nation Was Conceived with the Recognition of Pre-existing Inalienable Rights that the Constitution Does Not Specifically Enumerate But Nonetheless Acknowledges and Protects

The founding documents of American constitutionalism—the Declaration of Independence, the Constitution and the Bill of Rights—were accepted not because they exhausted the protection of basic rights but because they expressly protected unenumerated rights as well. Indeed, the Constitution was conceived to create a national government that although sufficiently powerful to bind together diverse states, "would not threaten the individual liberty that the people retained and did not cede to any level of government." (Written statement of Professor Laurence H. Tribe, Comm. Print Draft, Vol. 2, at 18–19.)

The broad purposes of this plan are clear from the language of the founding documents. As former Congresswoman and Professor Barbara Jordan testified: "The Declaration of Independence preceded the Constitution, and the Declaration of Independence speaks of inalienable rights endowed by our Creator . . . , among them life, liberty, [and the] pursuit of happiness." (Comm. Print Draft, Vol. 1, at 787.) The Fifth Amendment states that no person shall be deprived of "liberty." The Ninth Amendment mandates that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Finally, the Fourteenth Amendment—with its specific protection of "liber-

---

[5] These statements cannot be squared with either Judge Bork's own framework for interpreting the Constitution or the clear statements of the Supreme Court. Indeed, they are in direct conflict with the position of the revered Chief Justice, John Marshall, who stated in *Marbury* v. *Madison,* 1 Cranch 137, 174 (1803): "It cannot be presumed that any clause in the Constitution is intended to be without effect."

ty"—was added with a similar purpose: to restrain the power of the states to infringe the fundamental rights of any person.

The intent to protect inalienable, unenumerated rights is clear from the history of the Bill of Rights. Originally, many opposed a Bill of Rights, fearing that the express protection of certain rights would justify an inference that rights not specifically identified were subject to governmental control. The fear that the Bill of Rights would be used in a way inimical to unenumerated rights was best expressed by James Iredell at the North Carolina ratifying convention:

> A bill of rights, as I conceive, would not only be incongruous, but dangerous. No man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by this Constitution. Suppose, therefore, an enumeration of a great many, but an omission of some, and that long after all traces of our present disputes were at an end, any of the omitted rights should be invaded, and the invasion complained of; what would be the plausible answer of the government to such a complaint? Would they naturally say, "We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any ideas of our own. The bill of rights, passed at that time, showed that the people did not think every power retained which was not given, else this bill of rights was not only useless but absurd. But we are not at liberty to charge an absurdity upon our ancestors, who have given such strong proofs upon their good sense, as well as their attachment to a liberty. So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain. This is not one of them." Thus a bill of rights might operate as a snare rather than a protection. (Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Vol. IV, at 149 (1836).)

Despite fears such as those expressed by Iredell, a number of states were very much concerned about the absence of a Bill of Rights. These states ratified the Constitution on the understanding that a Bill of Rights, including a general provision that there should be no negative inference from the express protection of certain rights that unenumerated rights are not also protected, would shortly be added to the Constitution. (Written statement of David A. J. Richards, Comm. Print Draft, Vol. 3, at 1584–85.)

The Ninth Amendment, of course, expressly rebuts the negative inference feared by many of the Founders. As Madison said when he introduced the Amendment:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the general grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Gov-

ernment, and were consequently insecure. This . . . may be guarded against. I have attempted it . . . [referring to the Ninth Amendment]. (1 Annals of Congress 439 (Gales and Seaton 1834).)

The Supreme Court has recently underscored Madison's rationale. In *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980), the Court stated:

> The Constitution's draftsmen . . . were concerned that some important rights might be thought disparaged because not specifically guaranteed.
> **Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.** (*Id.*; emphasis added.)

Thus, the history surrounding the drafting and ratification of the Bill of Rights indicates that there had to be an express guarantee that unenumerated rights would be fully protected. The Ninth Amendment is at the core of both the Constitution and the ratification debates. The concept of unenumerated rights illustrates the depth of the tradition that the Founders meant to protect by the Ninth Amendment.

C. Judge Bork's Approach to Liberty and Unenumerated Rights Is Outside the Tradition of Supreme Court Jurisprudence

Judge Bork's approach to liberty and unenumerated rights sets him apart from every other Supreme Court Justice. Indeed, not one of the 105 past and present Justices of the Supreme Court has ever taken a view of liberty as narrow as that of Judge Bork. As Professor Tribe testified:

> If [Judge Bork] is confirmed as the 106th Justice, [he] would be the first to read liberty as though it were exhausted by the rights . . . the majority expressly conceded individuals in the Bill of Rights. He would be the first to reject an evolving concept of liberty and to replace it with a fixed set of liberties protected at best from an evolving set of threats. (Tribe statement, Comm. Print Draft, Vol. 2, at 7.)

In particular, Judge Bork's philosophy is outside the mainstream of such great judicial conservatives as Justices Harlan, Frankfurter and Black, as well as such recent conservatives as Justices Stewart, Powell, O'Connor and Chief Justice Burger. Each of these members of the Court accepted and applied some concept of liberty, substantive due process and unenumerated rights.

As summarized by former Secretary of Transportation William T. Coleman, Jr.:

> There can be no question that privacy and substantive individual liberty interests are clearly within the Constitution as written. Moreover, for more than half a century, the Supreme Court, by recognizing the constitutional basis for the protection of such fundamental liberties, has been able to respond in a principled fashion to the . . . prob-

lems and abuses which the framers could not have foreseen and thus cannot plausibly be said to have intended to immunize from constitutional protection. . . . Judge Bork . . . simply refuses to use the specific text "liberty" and over sixty years of Supreme Court jurisprudence or, if necessary (which it is not), the open-textured language of the Due Process Clause, to afford them constitutional protection from any intrusion in addition to mere physical restraint. (Written statement of William T. Coleman, Jr., at 21–22.)

1. In the 19th Century, the Supreme Court Recognized the Concept of Unenumerated Rights

From the earliest days of the Republic, "the Supreme Court has consistently and unanimously recognized that in adopting the Constitution, the people of the United States did not place the bulk of their hard-won liberty in the hands of government, save only for those rights specifically mentioned in the Bill of Rights or elsewhere in the document." (Tribe statement, Comm. Print Draft, Vol. 2, at 19; emphasis in original.)

In *Fletcher* v. *Peck*, 10 U.S. (6 Cranch.) 87, 135, 139 (1810), for example, Chief Justice Marshall barred a state's revocation of a series of land grants by relying, in part, on "general principles which are common to our free institutions." The Chief Justice noted that the "nature of society and government [may limit the] legislative power." Justice Story, in *Terret* v. *Taylor*, 13 U.S. (9 Cranch.) 43 (1815), struck down a state's attempt to divest a church of its property simply by declaring that the statute violated "principles of natural justice" and the "fundamental laws of every free government," as well as the "spirit and letter" of the Constitution.

The Court was even clearer in its recognition of certain fundamental rights in *Hurtado* v. *California*, 110 U.S. 516 (1884). It rejected the view that the Fourteenth Amendment—commanding that "[n]o State shall deprive any person of life, liberty, or property, without due process of law"—addressed only the fairness of legal procedures. The Court stated that the concept of limited government underlying the Constitution "guarantee[s] not particular forms of procedure, but the very substance of individual rights to life, liberty and property," protecting "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ." *(Id.* at 532, 535.)

2. The Justices of This Century, Including the Leading Conservative Justices, Have Recognized Unenumerated Rights

a. Justices Frankfurter and Harlan

Some witnesses have supported Judge Bork on the ground that his expressions of "judicial restraint" put him in the tradition of Felix Frankfurter and John Marshall Harlan. As stated by Secretary Coleman, former law clerk to Justice Frankfurter, "[i]n light of [Judge Bork's] views on substantive liberty and privacy, it is

clear that this characterization is 100% wrong." (Coleman statement at 20–21.)

Justice Frankfurter summarized his views on the liberty clause of the Fourteenth Amendment in *Rochin* v. *California*, 342 U.S. 165, 169 (1952):

> These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934), or are "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937).

In Justice Frankfurter's view, the due process clause "expresses a demand for civilized standards . . . [which] neither contain the peculiarities of the first eight amendments nor are . . . confined to them." *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 468 (1947) (Frankfurter, J., concurring). The clause, he said, possessed "independent potency." *Adamson* v. *California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring). And with respect to decisions applying the guarantees of the First Amendment to the states, Justice Frankfurter said they were based on the

> reasoning that the Fourteenth [Amendment] prevents state intrusion upon "fundamental personal rights and liberties," that among those rights and liberties are free speech, press, etc., which the First Amendment explicitly protects against federal encroachment, and that, because they are fundamental (not because they are contained in the First Amendment), they fall within the scope of the prohibitions of the Fourteenth [Amendment]. (F. Frankfurter, "Memorandum on 'Incorporation' of the Bill of Rights Into The Due Process Clause of the Fourteenth Amendment," 78 *Harv. L. Rev.* 746, 749 (1965).)

Like Justice Frankfurter, Justice Harlan argued for a conception of the due process clause that was flexible and was independent of, but drawing support from, the Bill of Rights. The clearest and most expansive expositions of Justice Harlan's views on liberty and due process are found in *Poe* v. *Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting), and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (Harlan, J., concurring in the judgment).

In *Poe*, Justice Harlan disagreed with the dismissal on procedural grounds of a challenge to Connecticut's ban on the use of contraceptives. He argued that the law should be struck down as "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." (367 U.S. at 539.) Justice Harlan then set forth his view of the appropriate constitutional framework:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our

> Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. **That tradition is a living thing.** A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint. (367 U.S. at 542 (Harlan, J., dissenting); emphasis added.)

Justice Harlan concluded:

> [Our] "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion, the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial and arbitrary impositions and restraints. . . . (Id. at 543.)

In *Griswold*, the Court struck down the Connecticut law. Justice Harlan stated that the proper constitutional analysis required an examination of whether the law "infringes the Due Process Clause of the Fourteenth Amendment because the enactment violated basic values 'implicit in the concept of ordered liberty,' *Palko* v *Connecticut*, 302 U.S. 319, 325." (*Griswold*, 381 U.S. at 500.)

Justice Harlan consistently advanced his view of "liberty" and "due process" articulated in his dissenting opinion in *Poe*. Dissenting in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), for example, he stated that "the very breadth and generality of the [Fourteenth] Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of 'liberty' and 'due process of law' but that the increasing experience and evolving conscience of the American people would add new 'intermediate premises.' " (*Id.* at 175; (Harlan, J., dissenting).) To restrict due process to "rules fixed in the pas[t] . . . 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' " (*Id.* at 176–77; footnote omitted.)

b. Justice Brandeis

Justice Brandeis expressed his conception of liberty in slightly different, albeit no less eloquent, terms. In a dissent now recognized as expressing the Court's majority view, he said:

> The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the

> pain, pleasure and satisfactions of life are to be bound in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Goverment, **the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.** (*Olmstead* v. *United States*, 277 U.S. 438, 478 (1928); emphasis added.)

c. Justice Black

While Justice Black's views on "liberty" were far different from those of Justice Frankfurter and Justice Harlan, they were still more expansive than those espoused by Judge Bork.

In *Loving* v. *Virginia*, 388 U.S. 1 (1967), for example, Justice Black joined the opinion of the Court striking down a state law prohibiting interracial marriage. The Court held not only that the law violated the Equal Protection Clause, but also that it deprived the petitioners of "liberty" within the meaning of the Due Process Clause. The Court said: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pusuit of happiness by free men." (*Id.* at 12.)

In *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), Justice Black joined the opinion of the Court holding that segregation by law in District of Columbia public schools deprived children of their "liberty" under the Fifth Amendment. The Court reasoned that the term "liberty" cannot be "confined to mere freedom from bodily restraint" but "extends to the full range of conduct which the individual is free to pursue . . . ." (*Id.* at 499–500.)

Justice Black also joined the Court's opinion in *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), which held that a law permitting the sterilization of habitual criminals violated the Equal Protection Clause of the Fourteenth Amendment. Central to the Court's analysis was the decision to subject the law to strict scrutiny because it affected "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence of the human race." (*Id.* at 541.)

Professor Walter Dellinger, former law clerk to Justice Black, testified that Judge Bork "does . . . [not] accept the enthusiastic approach of Justice Black, which fills in the liberty clause by a complete and total incorporation of the Bill of Rights." (Comm. Print Draft, Vol. 2, at 732.) And as summarized by Professor Stephen Schulhofer, who also clerked for Justice Black, in a letter to the committee:

> Justice Black often joined opinions that recognized fundamental liberties not explicitly enumerated. . . . [E]ven the restrictive theory that Justice Black sometimes espoused is far different from Judge Bork's position, because of the broader context of constitutional doctrine to which Justice Black passionately subscribed. (Comm. Print Draft, Vol. 3, at 2350.)

d. Justice Stewart

Justice Stewart also agreed that "liberty" in the Constitution has substantive content. Although he dissented in *Griswold*, his concur-

ring opinion in *Roe* v. *Wade,* 410 U.S. 113 (1973), clearly accepted the long line of substantive due process decisions:

> *Griswold* stands as one in a long line of . . . cases decided under the doctrine of substantive due process, and I now accept it as such. . . . The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. (*Id.* at 168.)

e. Justice Powell

Justice Powell has echoed the same themes as Justices Frankfurter and Harlan. He wrote in *Moore* v. *East Cleveland,* 431 U.S. 494 (1977), for example, that fundamental liberties were those that are "deeply rooted in this Nation's history and tradition." The right of privacy, he said, must be elaborated through "careful 'respect for the teaching of history [and] solid recognition of the basic values that underlie our society.' " (*Id.* at 503.)

Summarizing Justice Powell's opinion in *Moore,* Professor Dellinger testified:

> As Justice Powell said in *Moore* . . ., this court has long recognized that freedom of choice and marriage and family life is one of the liberties protected by the Fourteenth Amendment. With that sweeping text, with that as history, how can one decline to exercise the responsibility that is given, a responsibility which as Justice Powell says must be exercised with caution and restraint, but exercised nonetheless if the guarantees of the Fourteenth Amendment are not to become an empty set. (Comm. Print Draft, Vol. 2, at 725.)

f. Chief Justice Burger

Chief Justice Burger, while testifying in support of Judge Bork's confirmation, differs sharply from the nominee on the question of recognition of unenumerated rights. Writing for the Court in *Richmond Newspapers* v. *Virginia,* 448 U.S. 555 (1980), in which the Court held that the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments, he stated:

> [A]rguments such as the state makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, **the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and privacy** . . . appear nowhere in the Constitution or the Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection with explicit guarantees. The concerns expressed by Madison have thus been resolved; **fundamental rights, even though not expressly guaranteed,**

have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined. (*Id.* at 580–81; emphasis added.)

It is not only in his *Richmond Newspapers* opinion that Chief Justice Burger differs from Judge Bork on the question of unenumerated rights; the difference is also apparent from the Chief Justice's testimony. When asked about his defense of unenumerated rights in *Richmond Newspapers*, the Chief Justice said he "would be astonished if Judge Bork would not subscribe to it." (Comm. Print Draft, Vol. 2, at 699.) As discussed above, Judge Bork clearly does not subscribe to a theory of unenumerated rights as articulated by Chief Justice Burger in *Richmond Newspapers*.

g. Judge Bork's Views Stand Apart from Those of Other Justices

Across the range of cases that Judge Bork has criticized, some of the Justices identified above have dissented from individual decisions. None comes close, however, to sharing the nominee's judicial philosophy. As Senator Kennedy remarked at the hearing: "[W]hat we are basically talking about is just not one particular area of decisions, but we are talking about a[n] [ac]cumulation." (Comm. Print Draft, Vol. 1, at 782.)

When those cumulative views are considered, Judge Bork stands apart. As Professor Wechsler, who is sometimes referred to as sharing Judge Bork's views, has remarked: "In all the things Judge Bork has written, I've never seen any recognition on his part that the open-ended language of the 14th Amendment was not simply a way of describing the admission of Negroes to the polity but was understood to be a broad reference to freedoms. I think that it means it is legitimate for judges, within this realm of duty, to articulate untouchable areas of autonomy or freedom." (Lewis, "Bork on Liberty," *New York Times*, September 6, 1987.)

Every one of the Justices reviewed above has recognized the concept of fundamental rights and liberties—a concept Judge Bork steadfastly refuses to accept. (*See* Testimony of Paul Gewirtz, Comm. Print Draft, Vol. 2, at 1246; Tribe testimony, Comm. Print Draft, Vol. 2, at 55.)

3. Each Member of the Current Court Accepts the Notion of Fundamental Rights

As revealed by *Turner* v. *Safley*, 107 S. Ct. 2254 (1987), in which the Court unanimously struck down a ban on marriage by prison inmates, every current Justice accepts the view that the substantive "liberty" in the Constitution encompasses at least some fundamental personal matters. Justice O'Connor, in an opinion joined by every Justice (including Chief Justice Rehnquist and Justice Scalia), noted "that the decision to marry is a fundamental right" even for prisoners. (107 S. Ct. at 2265, *citing Zablocki* v. *Redhail*, 434 U.S. 374 (1976) and *Loving* v. *Virginia*, 388 U.S. 1 (1967).)

4. Prominent Constitutional Scholars Who Have Often Held Widely Different Views Reject Judge Bork's Philosophy of the Constitution

Two prominent constitutional scholars who otherwise often hold widely different constitutional views are Philip Kurland and Laurence Tribe. On the issue before the committee, however, both are in agreement. Both Professor Kurland and Professor Tribe testified against Judge Bork's confirmation, relying on an assessment of Judge Bork's views of the history and tradition from which this nation was conceived.

Professor Kurland said:

> My concern is very much that by providing as narrow a construction of the Constitution as possible with regard to individual rights and liberties, Judge Bork would be denying the essence of the purpose behind the Constitution's origins 200 years ago, which was the preservation of all the liberties that the English legal tradition had created and were in the process of creating and were expected to continue to create. (Comm. Print Draft, Vol. 3, at 1390.)

Similarly, Professor Tribe testified:

> He [Judge Bork] reads the entire Constitution as though the people who wrote and ratified it gave up to government all of the fundamental rights that they fought a revolution to win unless a specific reservation of rights appears in the text. . . . I am proud that we have . . . a 200-year-old tradition establishing that people retain certain unspecified fundamental rights that courts were supposed to discern and to defend. (Comm. Print Draft, Vol. 2, at 6–7.)

* * * * * * *

Judge Bork's narrow definition of liberty sets him apart from the tradition and history from which this nation was conceived. As Professor Kurland testified:

> Judge Bork's judicial philosophy . . . reveals an unwillingness to recognize that the principal objective of the framers of our Constitution two hundred years ago was the preservation and advancement of individual liberty. Liberty was indeed the watchword of the national convention and of the state ratifying conventions as well. The Constitution did not create individual rights; the people brought them to the Convention with them and left the Convention with them, some enhanced by constitutional guarantees. The Bill of Rights in guaranteeing more, made sure that none was adversely affected. (Comm. Print Draft, Vol. 3, at 1387.)

Judge Bork's definition of liberty also sets him apart from every Justice who has ever sat on the Supreme Court. Indeed, it is because of the Court that "an established part of our legal tradition [is] to view the Constitution as forbidding government abuses which, in the words of Justice Frankfurter, 'offend those canons of decency and fairness which express the notions of justice of Eng-

lish-speaking peoples.' " (Coleman Statement at 12, *quoting Adamson* v. *California*, 332 U.S. 46, 59, 66–67 (1947) (Frankfurter, J., concurring).)

II. THE THEORY OF PRECEDENT OR "SETTLED LAW" HELD BY JUDGE BORK CANNOT TRANSFORM HIS JUDICIAL PHILOSOPHY INTO AN ACCEPTABLE ONE FOR THE SUPREME COURT

A. While Judge Bork's Theory of Precedent Appears to Lessen the Friction Between His Philosophy of Original Intent and Accepted Supreme Court Decisions, It Leaves Many Uncertainties and Concerns

Judge Bork has applied his theory of the Constitution to attack a large number of Supreme Court decisions, including many landmark cases. Reconsidering these cases would reopen debate on many significant issues. Perhaps this is why Judge Bork said in response to a question by Senator Thurmond, "anybody with a philosophy of original intent requires a theory of precedent." (Comm. Print Draft, Vol. 1, at 101.) While a theory of precedent appears to lessen the friction between Judge Bork's philosophy and accepted Supreme Court decisions, it creates in the end many uncertainties and concerns of its own.

Prior to the hearings, Judge Bork had occasionally expressed the view that some decisions ought now to be upheld, even though wrong under his theory of original intent. The hearings, however, provide by far the most extended discussions by Judge Bork of his theory of precedent.

Under questioning by Senator Thurmond, for example, Judge Bork said:

> What would I look at [before overruling a prior decision]? Well, I think I would look and be absolutely sure that the prior decision was incorrectly decided. That is necessary. And if it is wrongly decided—and you have to give respect to your predecessors' judgment on these matters—the presumption against overruling remains, because it may be that there are private expectations built up on the basis of the prior decision. It may be that governmental and private institutions have grown up around that prior decision. There is a need for stability and continuity in the law. There is a need for predictability in legal doctrine. (Comm. Print Draft, Vol. 1, at 101.)

In other places, Judge Bork encapsulated these thoughts by saying that law, even erroneous law, can become "settled," meaning it should not be overruled. (*See, e.g.*, Comm. Print Draft, Vol. 1, at 84, 414.)

Later, in response to a question from Senator Heflin, Judge Bork added countervailing considerations—considerations that argued in favor of overruling a precedent:

> Now, of course, against [upholding a precedent] is—if it is wrong, and secondly, whether it is a dynamic force so that it continues to produce wrong and unfortunate decisions. I think that was one of the reasons the court in Erie Rail-

> road against Tompkins overruled Swift against Tyson, a degenerative force, but I think what Brandeis or somebody can maybe call dynamic potential. (Comm. Print Draft, Vol. 1, at 268.)

An exchange with Chairman Biden produced a further statement on these countervailing considerations:

> [A] case should not be overruled unless it was clearly wrong and perhaps pernicious, "pernicious" . . . meant there in the sense of capable of having dynamic force, generative force, that would produce new wrong decisions. (Comm. Print Draft, Vol. 1, at 297.)

Finally, Judge Bork concluded his testimony by emphasizing his respect for precedent:

> [T]here are views I have testified to here that reaffirm my acceptance of a body of jurisprudence as established and no longer judicially assailable, notwithstanding, that [it] has developed in a manner different from a direction I had suggested . . . . [W]hen I say [the result in a case is required by] "the law,' I regard precedent as an important component of the law. As I have described many times here, there are a number of important precedents that are today so woven into the fabric of our system that to change or alter them would be, in my view, unthinkable. (Comm. Print Draft, Vol. 1, at 721–22.)

The committee finds that Judge Bork's ideas concerning precedent or settled law, in both their general terms as well as the manner in which Judge Bork applies them to particular cases, raise a number of serious concerns.

B. Judge Bork's Combination of Original Intent and Settled Law Creates an Irresolvable Tension Between His Oft-Repeated Desire to Reformulate Constitutional Law and His Willingness to Follow a Decision He Believes to be Profoundly Wrong

1. Judge Bork Has Often Announced His Firm Conviction that Many Supreme Court Decisions Are Flatly Wrong and Ought to be Overruled

Judge Bork's embrace of precedent sets up a sharp tension with his often repeated proclamations of the ease with which a judge with his views can overrule erroneous decisions. Judge Bork's record, in fact, strongly suggests a willingness to "reformulate" "broad areas of constitutional law." ("Neutral Principles" at 8.)

In January of this year, for example, Judge Bork claimed:

> Certainly at the least, I would think that an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. (remarks to the *First Annual Lawyers Convention of the Federalist Society,* January 31, 1987, at 126.)

In a speech delivered before an Attorney General's conference in 1986, he observed:

> The Court's treatment of the Bill of Rights is theoretically the easiest to reform. It is here that the concept of original intent provides guidance to the courts and also a powerful rhetoric to persuade the public that the end to [judicial] imperialism is required and some degree of reexamination desirable. ("Federalism," *Attorney General's Conference Speech*, January 24–26, 1986, at 9.)

Prior to the hearings, Judge Bork seemed to elevate his views of original intent over respect for precedent: "Supreme Court justice[s] can always say . . . their first obligation is to the Constitution, not to what their colleagues said 10 years before." ("Justice Robert H. Bork: Judicial Restraint Personified," *California Lawyer*, May 1985, at 25.) During the hearings, Senator Kennedy played an audio tape of the question and answer period following a 1985 speech in which Judge Bork made perhaps his clearest declaration to that effect:

> I don't think that in the field of constitutional law precedent is all that important. I say that for two reasons. One is historical and traditional. The court has never thought constitutional precedent was all that important. The reason being that if you construe a statute incorrectly, the Congress can pass a law and correct it. If you construe the Constitution incorrectly Congress is helpless. Everybody is helpless. **If you become convinced that a prior court has misread the Constitution I think it's your duty to go back and correct it.** Moreover, you will from time to time get willful courts who take an area of law and create precedents that have nothing to do with the name of the Constitution. And if a new court comes in and says, 'Well, I respect precedent,' what you have is a ratchet effect, with the Constitution getting further and further away from its original meaning, because some judges feel free to make up new constitutional law and other judges in the name of judicial restraint follow precedent. **I don't think precedent is all that important. I think the importance is what the Framers were driving at, and to go back to that.** (*Canisius College Speech*, October 8, 1985, *quoted in* Comm. Print Draft, Vol. 1, at 523–24, emphasis added.)

Following the playing of this tape, the following exchange took place:

> Senator KENNEDY. Those statements speak for themselves. Your own words cast strong doubt upon your adherence to precedent that you think is wrong.
>
> Judge BORK. Senator, you and I both know that it is possible, in a give and take question and answer period, not to give a full and measured response. You and I both know that when I have given a full and measured response, I have repeatedly said there are some things that are too settled to be overturned . . . .

> It is not the kind of thing that ought to be weighed against my more considered statements when I am not just engaging in give and take. (Comm. Print Draft, Vol. 1, at 527.)

The committee finds that even accepting this explanation, Judge Bork's views pose a serious dilemma. Judge Bork has strongly suggested a reformation in constitutional law, one that will bring a "second wave in constitutional theory." Although perhaps open to differing interpretations, the committee is concerned that the "second wave" is aimed at reform in the courts —in the decisions courts reach, not just in the classroom as some academic exercise. (*See* "The Crisis in Constitutional Theory: Back to the Future," *Speech to the Philadelphia Society.* April 3, 1987, at 10–15, *quoted in* Comm. Print Draft, Vol. 1, at 672–77.) Against this drive to pursue his views on original intent, and to "sweep the elegant, erudite, pretentious, and toxic detritus of non-originalism out to sea" (Comm. Print Draft, Vol. 1, at 677), Judge Bork has erected the breakwater of his theory of precedent. The question is: How much will it hold back?

At the very least, Judge Bork's opposing forces pose a dilemma for litigants. As Robert Bennett, Dean of the Northwestern University School of Law, testified:

> A moment's reflection will show that it will not do to say that a case was wrong but I will not vote to overrule it. What are lawyers and litigants to do with that case when the next one arises that is a little bit different? Are they to appeal to what the judge says is constitutionally right or to the precedent he says he will tolerate, even though it is wrong?
>
> To be sure, all judges suffer from this dilemma to a degree, but few insist that they know the route to constitutional truths with the vehemence that Judge Bork does. For that reason, I remain baffled and concerned about Judge Bork's likely approach to the use of precedent, despite the assurances he has offered. (Comm. Print Draft, Vol. 3, at 1224.)

The committee believes there is a substantial risk that Judge Bork would resolve this dilemma by reading a prior decision very narrowly, so that it had little, if any, substantial effect on future decisions, notwithstanding that it is never overruled. In Judge Bork's terms, a prior decision can lose its "dynamic" or "generative" force through another kind of barren reading, this time of the past decision itself. As Professor Gewirtz testified:

> [M]ost lawyers recognize that precedents are generally capable of either a broad or restrictive reading. . . . Given the leeway that judges inevitably have . . . I think it's reasonable to conclude that Judge Bork will read decisions he disagrees with restrictively, and that means, of course, that in the closely contested cases, that are the sort of cases that come to the Supreme Court, it is likely that Judge Bork would decide the earlier decisions he believes were wrongly decided simply don't control the matter in question. (Testimony of Paul Gewirtz, Comm. Draft Print,

Vol. 2, at 1171; *see also* Remarks of Senator Specter, Comm. Print Draft, Vol. 1, at 255; Testimony of Burke Marshall, Comm. Print Draft, Vol. 1, at 832; Tribe statement, Comm. Print Draft, Vol. 2, at 32-34.)

The committee finds that there are substantial uncertainties in the extent to which Judge Bork's respect for settled law would operate as a serious curb on his pursuit of his idea of original intent. All that is necessary is to understand what one witness called the "lens effect:" Judge Bork would simply see future cases through a lens that embodied his own strong views about original intent and would thereby be highly likely to see the erroneous, but settled decisions, as inapplicable to new situations. (*See* statement of Thomas Grey, Comm. Print Draft, Vol. 2, at 1106.)

2. Judge Bork's Testimony on the First Amendment's Clear and Present Danger Standard Demonstrates that a Judge Who "Accepts" Precedent with Which He Disagrees May Well Read that Precedent Narrowly

In the early part of this century, Justices Holmes and Brandeis argued in now-famous dissents that speech critical of the government may be punished only when it presents a "clear and present danger." (*See Abrams* v. *United States,* 150 U.S. 616 (1919) and *Gitlow* v. *New York,* 268 U.S. 652 (1925).) The Supreme Court has accepted these dissents as expressing the correct view of the First Amendment and has articulated its most recent formulation of the "clear and present danger" standard in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969). Judge Bork's testimony on *Brandenburg* provides an excellent insight into the uncertainties associated with his theory of precedent.

As Senator Specter said, *Brandenburg* "essentially state[s] the Holmes' clear and present danger doctrine" (Comm. Print Draft, Vol. 1, at 254), and prohibits a state from punishing speech advocacy unless it involves "incitement to imminent lawless action." Prior to the hearings, Judge Bork had criticized *Brandenburg* as fundamentally wrong." ("The Individual, the State, and the First Amendment," *University of Michigan* (1979), at 19.) Before the committee, however, he first testified: "I think *Brandenburg* is fine. I am not concerned about it." (Comm. Print Draft, Vol. 1, at 255.) The next day, in response to a question by Senator Thurmond, Judge Bork expanded on his position concerning *Brandenburg*:

> I had really said, I did say that I thought theoretically the advocacy of law violation in . . . circumstances [not involving a claim that the law being challenged was unconstitutional] could have been punished under the First Amendment. What *Brandenburg* did was say there must be a closer nexus between the advocacy and the lawless action. It said the advocacy of law violation must be in circumstances where there is the likelihood of imminent lawless action. So it added one factor to what I said, the closeness of the danger.
>
> Now, I have not changed my mind about what I said upon this subject. I could have accepted a First Amend-

ment law that developed the way I thought in 1971 it ought to have from the beginning. I could accept that.

The law did not develop that way. It developed to require a closer nexus between the advocacy and the violent action or the lawless action, imminent lawless action. . . .

I accept the fact that the Supreme Court has added an additional safeguard to the position that I took in 1971 for speech advocating lawlessness. As an academic, I thought that was not theoretically justified. As a judge, I accept it, and that is all there is to that. (Comm. Print Draft, Vol. 1, at 311.)

Later the same day, responding to Senator Specter, Judge Bork said of *Brandenburg*, "I accept *Brandenburg* as a judge and I have no desire to overturn it. I am not changing my criticism of the case. I just accept it as settled law." (Comm. Print Draft, Vol. 1, at 409.)

Senator Specter then identified the difficulty with Judge Bork's views:

[T]hat brings up the subject down the line as to original intent and how firmly committed you are to accepting stare decisis, and there are some strong statements which you have made that an originalist ought not to accept cases which have been established. . . .

One, the next case will have a shading and a nuance and I am concerned about your philosophy and your approach. And, secondly, I am concerned about your acceptance of these cases. If you say you accept this one, so be it. But you have written and spoken, ostensibly as an original interpretationist, of the importance of originalists not allowing the mistakes of the past to stand. (Comm. Print Draft, Vol. 1, at 410–11.)

Professor Gewirtz made the same point, albeit in different terms:

Brandenburg is usually said to hold that advocacy may be punished only if it involved "incitement to imminent lawless action." But the Supreme Court concluded that the Ohio statute was unconstitutional on its face; read narrowly, *Brandenburg's* "holding" could be limited to that, and not read as a rule about what particular degree or kind of proximate danger is constitutionally required. Furthermore, . . . if Judge Bork does not accept the "intellectual and historic and traditional underpinning" of the clear-and-present-danger requirement—if he does not genuinely accept the premises for protecting extreme speech—then he may end up applying clear-and-present-danger standards in a more restrictive way than others would. He might, for example, "accept" *Brandenburg* in the sense of requiring more than mere advocacy to sustain a conviction, but nevertheless uphold a conviction based on jury instructions that require a somewhat lesser degree of imminence of harm than other readings of *Brandenburg* might suggest. (Statement of Paul Gewirtz, Comm. Print Draft, Vol. 2, at 1185–86.)

These statements were not made only in the abstract. In *Hess v. Indiana*, 414 U.S. 105 (1973), the Supreme Court reviewed the conviction of an anti-war demonstrator for using a vulgar word in promising a return to the streets after he had been removed by the police. The Court reversed the conviction on the ground that because the lawless action was not imminent, the demonstrator's advocacy could not be proscribed. The Court treated the case as one controlled by *Brandenburg*.

In the hearings, however, Judge Bork did not find that *Brandenburg* controlled the facts presented by *Hess*. In an exchange with Senator Specter, he said that in his view, *Hess* was an "obscenity in the public streets" case, not a case involving dissident political speech, and he was not "so wild about it." (Comm. Print Draft, Vol. 1, at 411.)

Judge Griffin Bell, who testified on Judge Bork's behalf, seems to concur with this analysis. After Senator Specter described the facts of *Hess*, Judge Bell stated:

> Well, I am not familiar with the *Hess* case, but that would bother me if somebody said they would do something and then they immediately figure a way to get around it . . . . I do not think you could make an obscenity case out of the facts as you stated them. I mean, I do not think that could be seriously argued that that was an obscenity case. It is a speech case. (Comm. Print Draft, Vol. 3, at 1377.)

Judge Bork's colloquy with Senator Specter, and the analysis of his remarks by Senator Specter and Professor Gewirtz, illustrate the uncertainties and risks with Judge Bork's theory. If *Hess v. Indiana* had not yet been decided, and Judge Bork were confirmed, it is clear that he would be able to dissent in *Hess*, treating it as an obscenity case—**and yet remain faithful to everything he said in the hearings about precedent generally, and everything he said about his faithfulness to *Brandenburg* specifically.**

This is only one example of the ways in which the statements Judge Bork made in the hearings leave substantial uncertainties about how he would "follow precedent," on the one hand, and how he would pursue his version of original intent, on the other hand. (*See also* Gewirtz statement, Comm. Print Draft, Vol. 2, at 1183–1186.)

. Judge Bork's Theory of Settled Law Applies Less to Cases Extending Individual Liberties than to Cases Making Structural or Institutional Changes in Government, And Thus Would Not Protect Those Individual Rights Cases that Judge Bork Has Criticized

Judge Bork has said that "the Court's treatment of the Bill of Rights is theoretically the easiest to reform." (*Attorney General's Conference Speech*, Jan. 24–26, 1986, at 9.) Decisions involving the Bill of Rights largely involve the expansion of individual rights. As such, complex social institutions and economic structures do not usually build up around them. They are thus typically different from cases like those expanding the power of Congress to regulate commerce or the power of the U.S. government to issue paper money as legal tender. These latter cases have become, in Judge

Bork's words, "the basis for a large array of social and economic institutions, [therefore] overruling them would be disastrous." (Comm. Print Draft, Vol. 1, at 102.) If such institutions have not grown up around Bill of Rights cases, they are to that extent easier to reform. As Professor Grey explained:

> These examples [of the Commerce Clause and the Legal Tender Cases] illustrate the very weak character of the constraints imposed by precedent on the overruling of "erroneous" constitutional precedent. **In both cases, the protected precedents expanded governmental power.** In both cases, any attempt to overrule them would involve social upheavals of vast dimensions, and would be completely impractical. **Decisions defining and protecting individual constitutional rights rarely if ever are so socially entrenched. It is difficult to think of any individual rights decision or line of decisions that, if overruled, would present the intractable practical difficulties posed by the cases Judge Bork has used as examples. Indeed, I have not found any example in his pre-nomination discussions of the doctrine of precedent of any constitutional decision protecting individual rights that he identifies as even presumptively immune from overruling.** (Grey Statement, Comm. Print Draft, Vol. 2, at 1108; emphasis added.)

During the committee hearings, Judge Bork for the first time made some specific references to individual rights decisions that were, in his view, "settled." They were *Brandenburg, Shelley v. Kraemer* and *Bolling v. Sharpe,* and some of the freedom of the press cases. Each is, to varying degrees, difficult to square with Judge Bork's announced criteria for refusing to overrule a decision. Even putting that aside, however, there still is a tremendous area—in which the Court has given content to unenumerated rights and liberties—where his prior stated positions are not in the least constrained by his statements before the committee concerning settled law.

D. Judge Bork's Statements About the Application of Settled Law to Old Conflicts Say Little About His Willingness to Apply the Tradition of Unenumerated Rights to New Conflicts Between Government and the Individual that May Arise

The Supreme Court's prior decisions, whether settled or not, cannot cover all new situations, under even the broadest reading of those cases. It is in the context of these new cases that Judge Bork's theory of original intent would stand without any of the contraining influence of precedent. Thus, "Judge Bork's record is . . . a source of concern because of what it reveals about how he is likely to approach novel issues of liberty and equality that will emerge in the years ahead, issues where a Justice has a leeway that is not closely channelled by precedent." (Gewirtz statement, Comm. Draft Print, Vol. 2, at 1186.)

In the committee's view, respect for precedent, as Judge Bork expressed it, does not alleviate the concern that the nominee would pursue his particular theory of original intent. It does not remove the risk that important precedents preserving individual liberties

and human dignity would be robbed of their generative force. And it in no way compensates for his rejection of the tradition of unenumerated rights, a tradition that must be maintained to deal with new issues as they arise in the future.

PART THREE: A CRITICAL ANALYSIS OF JUDGE BORK'S POSITIONS ON LEADING MATTERS

I. THE RIGHT TO PRIVACY—THE RIGHT TO BE LET ALONE

A. Before the Hearings, the Right to Privacy Had Been a Principal Part of Judge Bork's Attack on the Supreme Court

The constitutional right to privacy or, in Justice Brandeis's words, the right to be let alone, has been a major part of Judge Bork's attack on the jurisprudence of the Supreme Court. In 1971, for example. he denounced the first modern privacy decision, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), as "unprincipled" and "intellectually empty." *Griswold* concerned a law making it a crime for anyone to use birth control. Judge Bork said that the desire of a "husband and wife to have sexual relations without unwanted children" was indistinguishable, for constitutional purposes, from the desire of an electric utility company to "void a smoke pollution ordinance." "The cases," he said, "are identical." ("Neutral Principles" at 8–9.)

Judge Bork reiterated his attack on *Griswold* after becoming a federal court judge. In a 1982 speech, he said that "the result" in the case could not "have been reached by interpretation of the Constitution." (*Catholic University Speech* at 4.) In 1985, he announced that there was no "supportable method of reasoning underlying" *Griswold.* (*Conservative Digest* Interview, October 1985, at 97.) In 1986, he declared that replacing the approach in *Griswold* with a "concept of original intent" is "essential to prevent courts from invading the proper domain of democratic government." ("The Constitution, Original Intent, and Economic Rights," 23 *San Diego L. Rev.,* 823, 829 (1986).)

In an interview given after he was nominated to the Supreme Court, Judge Bork was asked: "But your core views on privacy expressed in [the 1971 *Indiana Law Journal* article]—you still believe?"

> Answer. "Yes. I agreed with Justice Black, who dissented in that case, *Griswold* v. *Connecticut.*" (July 29, 1987, *St. Louis Post-Dispatch.*)

Judge Bork's attacks on the privacy right have extended to the principal cases upon which *Griswold* relied, and would extend, presumably, to all the cases subsequent to *Griswold,* although Judge Bork has identified only *Roe* v. *Wade* by name. (*Hearings Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee,* 97th Cong., 1st Sess., June 10, 1981, at 310.)

One of the cases relied upon by the Court in *Griswold* was *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942). There, the Supreme Court unanimously set aside a state law that imposed sterilization upon

certain common criminals, but not upon embezzlers or other white collar criminals. Said the Court: "We are dealing here with legislation which involves one of the basic rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." (*Id.* at 541.) Judge Bork has analyzed *Skinner* as follows:

> All law discriminates and thereby creates inequalities. The Supreme Court has no principled way of saying which nonracial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as "fundamental interests," in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases [such as] *Skinner*. ("Neutral Principles" at 11–12.)

In speeches and writings after he became a judge, the nominee has also said that the " 'right of procreation' . . . is another made-up constitutional right . . . Neither it [nor the right] to privacy are to be found anywhere in the Constitution." [6] ("Foundations of Federalism: Federalism and Gentrification," *Yale Federalist Society*, April 24, 1982, at 9 of the Question and Answer Period; *see also* "The Struggle Over the Role of the Courts," *National Review*, September 17, 1982, 1137, 1138; "A Conference on Judicial Reform," *Free Congress and Education Foundation*, June 14, 1982, at 6.)

Judge Bork addressed the Supreme Court's line of privacy decisions in two opinions on the Court of Appeals. In *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984), he wrote that the Supreme Court had created "new rights" in the privacy cases. Judge Bork recited the holdings in a number of those cases and concluded that since they lacked an "explanatory principle," (*id.* at 1395–96), lower court judges could not determine how to apply them in new cases.

In *Franz* v. *United States*, 707 F.2d 582 (D.C. Cir. 1983), Judge Bork went out of his way in his concurring opinion to criticize the majority opinion for finding that the privacy decisions of the Supreme Court implied some constitutional protection for the right of a non-custodial father to maintain visitation rights with his child. Judge Bork argued that the right of privacy was "ill-defined," and that "[s]ince the Constitution itself provides neither textual nor structural guidance to judges embarked upon this chartless sea, it behooves us to be cautious rather than venturesome." (707 F.2d at 1438.)

As a lower court judge, the nominee was, of course, bound to abide by *Griswold* and its progeny. Judge Bork acknowledged this very point in *Dronenburg*, stating that his arguments against *Griswold* and the other privacy cases were "completely irrelevant to the function of a circuit judge. The Supreme Court has decided that it may create new constitutional rights and, as judges of constitutionally inferior courts, we are bound absolutely by that determination." (*Dronenburg*, 741 F.2d at 1396 n. 5.) In the committee's view,

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[6] During the hearings, Judge Bork suggested that he might have reached the same result the Court did in *Skinner* by applying a "reasonableness test" under the Equal Protection Clause. Whether or not he would do so, however, Judge Bork has made clear that he rejects the right of procreation in *Skinner*.

however, Judge Bork's opinions in *Dronenburg* and *Franz* suggest that there is a significant risk that he would vote to overrule *Griswold* and the other privacy cases if freed of the constitutional and institutional constraints that limit a lower court judge.

Judge Bork's strong attack on the Court's line of privacy decisions left no doubt before the hearings about his position. In an interview given just before coming before the committee, however, Judge Bork interjected into his discussion of *Griswold* what might be construed as a qualification:

> The court did not dispose of it in a logical way, on the basis of sound constitutional reasons. A lot of cases in which the court's reasoning isn't adequate might conceivably come out the same way on adequate reasons. I [once] said something rather harsh about *Roe* v. *Wade*, but [what I said] really applied more to the line of reasoning that was followed. ("Sentences From the Judge," *Newsweek*, September 14, 1987, at 36.)

This proferred distinction between the Court's reasoning and the result it reaches was a major topic at the hearings.

B. At the Hearings, Judge Bork Confirmed His Pre-Hearing Views About a Right to Privacy

At the hearings, Judge Bork repeated in various ways the claim that although "[t]here is a lot of privacy in the Constitution," (Comm. Print Draft, Vol. 1, at 217), there is no "generalized" right to privacy of the kind necessary to support *Griswold* and its progeny. He testified that in the Constitution there is no "unstructured, undefined right of privacy [such as the right] that Justice Douglas elaborated [in *Griswold*]." (Comm. Print Draft, Vol. 1, at 87.) Senator Simpson and Judge Bork engaged in the following exchange:

> Senator SIMPSON. I want to ask you if it is fair to say that you believe that privacy is protected under the Constitution, but that you just do not believe that there is a general and unspecified right that protects everything. . . . Is that correct?
>
> Judge BORK. That is correct, Senator. (Comm. Print Draft, Vol. 1, at 217.)

When Senator Hatch queried him about Justice Black's view of the "so-called privacy right," Judge Bork seemed to endorse the view that the right "was utterly unpredictable." (Comm. Print Draft, Vol. 1, at 157.) He described his objection to a "generalized" right to privacy:

> Nobody knows what that thing means. But you have to define it; you have to define it. And the court has not given it definition. That is my only point. (Comm. Print Draft. Vol. 1, at 218.)

At this juncture, Judge Bork's objection seemed to be that the Court had not defined the privacy right sufficiently, so that it is "utterly unpredictable."

It became clear, however, that Judge Bork also believes that there is no constitutional right extending privacy protections

beyond those provided by specific amendments. As summarized by Chairman Biden:

> Yesterday you indicated that although you did not like the generalized right of privacy or use of substantive due process, you time and again pointed out that certain core ideas were protected and they were protected by the First Amendment, you pointed out. Privacy. First Amendment, Fourth Amendment, Fifth Amendment, Eighth Amendment. You went down the list.
>
> Now, what I would like to ask you is this. If Justices Harlan, Powell, Frankfurter, Jackson, Cardozo had found a fundamental right of privacy or a fundamental right to be protected under another specific amendment to the Constitution, there would not have been any occasion to see that the Constitution also contains the basic right of privacy.
>
> Obviously they could not find it in any single amendment. Therefore, my question is, putting aside all the specific amendments you have mentioned either now or during the past several days, do you believe that the Constitution recognizes a marital right to privacy? (Comm. Print Draft, Vol. 1, at 300.)

Judge Bork responded: "I do not know. It may well . . . But I have never worked on a constitutional argument in that area." (*Id.*) In a colloquy with Senator DeConcini, Judge Bork suggested that the equal protection clause might be an alternative basis for reaching the same result as the Court did in *Griswold*. (Comm. Print Draft, Vol. 1. at 300.)

In his testimony before the committee, therefore, Judge Bork returned to the distinction, first articulated in his September 14, 1987 *Newsweek* interview, between reasons and results. This distinction ultimately failed, however, to leave any prospect that a rationale for the right to privacy satisfactory to Judge Bork could ever be found.

First, Judge Bork testified that *Griswold* did not contain a correct understanding of the liberty and due process clauses of the Fourteenth Amendment: "Well, if they apply the due process clause that way . . . . Why not in *Griswold* v. *Connecticut* and why not in all kinds of cases? You are off and running with substantive due process which I have long thought is a pernicious constitutional idea." (Comm. Print Draft, Vol. 1, at 262.) Second, he testified that the Ninth Amendment provided no justification for the result in *Griswold*. (Comm. Print Draft. Vol. 1, at 102–03; 224–25; 241.) Third, he said he would have dissented in *Griswold*. (Comm. Print Draft. Vol. 1. at 573.) Finally, in response to Senator Heflin, Judge Bork testified, "I do not have available a constitutional theory which would support a general, defined right [of privacy]." (Comm. Print Draft, Vol. 1, at 266.)

Thus, Judge Bork has rejected all the offered rationales for a right to privacy of the sort necessary to support *Griswold* and its progeny, as well as the entire constitutional tradition of unenumerated rights upon which it rests. It appears that Judge Bork adheres to his earlier view that "the result" in *Griswold* could not be

reached by "interpretation" of the Constitution. (*Catholic University Speech* at 4.) At the same time, he left open the possibility that "maybe somebody would offer" him a new argument for the right that he would accept. (Comm. Print Draft, Vol. 1, at 90.)

In the committee's view, it is unlikely that a successful new argument will be proffered. As several witnesses testified, the arguments in support of a right to privacy have in the course of our constitutional history been presented; indeed, they were all summarized or alluded to in the *Griswold* case itself. (*See* Comm. Print Draft, Vol. 3. at 1611-13; Tribe testimony, Comm. Print Draft, Vol. 2, at 45 ("I do not think that constitutional law is a game of hide and seek. The idea that there might be a right hiding there from Judge Bork to be discovered in the next decade . . . is not very plausible").) Given Judge Bork's extensive experience in analyzing these matters, his steadfast rejection of the tradition of unenumerated rights and his professed inability thus far to find any constitutional warrant for such a right, there is little, if any, prospect that a new argument will be presented that is both unique and convincing to him.

As Chairman Biden concluded after two-and-a-half weeks of hearings:

> Will [Judge Bork] be part of the progression of 200 years of history of every generation enhancing the right to privacy and reading more firmly into the Constitution protection for individual privacy? Or will he come down on the side of government intrusion? I am left without any doubt in my mind that he intellectually must come down for government intrusion and against expansion of individual rights. (Comm. Print Draft, Vol. 3, at 1615.)

C. Judge Bork's Denial of the Right to Privacy Places the Entire Line of Privacy Decisions at Risk, and Is Likely to Prevent Any Subsequent Development and Extension of It

During the hearings, Judge Bork expounded on his theory of "settled law"—of accepting past cases even though they were wrong. He offered to the committee new examples of cases with which he still disagreed, but which he would not overrule because they had become, in his view, settled law. (*See* Part Two, Section II, *supra.*) Judge Bork did not include within his examples any of the privacy decisions. Accordingly, Judge Bork left the committee with the clear impression that he feels free to overrule any or all of the privacy decisions. And given his conclusion that the doctrine of substantive due process is "pernicious," (Comm. Print Draft, Vol. 1, at 262), there is a substantial risk of overruling.

The committee recognizes that Judge Bork testified that he would entertain arguments that these cases were the sort that should not be overruled. (*See, e.g.,* Comm. Print Draft, Vol. 1, at 268.) At the very least, however, he can be expected to limit them to their narrow facts. To do otherwise would mean that they would continue to operate as a "generative" force in the law, producing new erroneous decisions. (*See* Part Two, Section II, *supra.*) Thus, if he did not overrule these cases, there is a substantial risk that he would certainly leave the right to privacy inapplicable to future

cases. The manner in which he analyzed the privacy cases in *Dronenburg* and *Franz* provides a partial insight into how he might eviscerate the right to privacy.

As Professor Sullivan testified, Judge Bork's views on privacy place him in a lonely position:

> On the scope of the right to privacy, good and reasonable, fair-minded men and women differ greatly, and in good faith, and that has happened, it is happening now, and I expect it to continue as long as there is a right of privacy to argue about.
>
> **But there has been no disagreement on the Supreme Court, for 75 years, that there exists some right to privacy, and it is that disagreement of Judge Bork that we are focusing on.**
>
> There are two sides to the issue on its scope, but there have not been, in our jurisprudence, two sides of the issue as to its existence, and that is what puts Judge Bork outside the mainstream. (Comm. Print Draft, Vol. 3, at 1621; emphasis added.)

After this testimony, Senators Biden and Simpson engaged in the following colloquy:

> The CHAIRMAN. I want to make it clear, that as I understand what Judge Bork has said, he disagreed with the existence of a generalized right to privacy, and in that sense he is all by himself in the line of justices for the past 75 years. . . . That is the debate. If I am wrong about that, I would like to be corrected now. . . . [T]his is so fundamental a point.
>
> Senator SIMPSON. Mr. Chairman, it is, indeed, and in one sentence let me say that Judge Bork—and he said it so clearly—his problem with the abstract constitutional right of privacy is that it has no inherent limits. . . .
>
> The CHAIRMAN. You are correct that Judge Bork said that there are no inherent limits. **Ergo, he has concluded, because he cannot find a way to put limits upon it, like other judges have, because he does not want to be subjective, which he says he rejects out of hand and worries about. Because he cannot place—there are no inherent limits—he chooses to deny the existence of the right in the first instance.** (Comm. Print Draft, Vol. 3, at 1621–22; emphasis added.)

The Chairman's conclusion suggests that by rejecting the tradition of unenumerated rights, including the right to privacy, Judge Bork may place his desire to minimize the influence of judges in society above his own first principle, faithfulness to the original intent.

In the committee's view, one additional point about the Supreme Court's privacy cases merits brief mention. The Court in these decisions has not been floating, as Judge Bork has said, on a "chartless sea," (*Franz*, 707 F.2d at 1438), constructing unpredictable rights that strike without warning. It has been constrained and guided by the text, history and structure of the Constitution, together with

the history, tradition and collected wisdom expressed in the Supreme Court's decisions. As Professor Sullivan testified, "[the Justices] have said look to our traditions, look to our values." In doing that, the Court has articulated a right that "doesn't strike without warning. It has been an extraordinarily limited right as expounded by the Supreme Court so far." (Comm. Print Draft, Vol. 1, at 1634, 1640.)

* * * * * *

The rights recognized by the Supreme Court have been tremendously important, and promise to continue to be so into the future. Consider what our nation would have been like had the Court not implemented the history and tradition of the Constitution:

It would not have affirmed a right "to marry, establish a home and bring up children." (*See Meyer* v. *Nebraska*, 262 U.S. 390 (1923).)

It would not have prevented the government from making it a crime to send children to private school. (*See Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).)

It would not have prohibited the government from sterilizing a selected group of criminals; nor could it protect other citizens from interferences with reproduction. (*See Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).)

It would not have intervened to stop a government from outlawing the use of birth control by married couples (*See Griswold* v. *Connecticut*, 381 U.S. 479 (1965)), **or by others.** (*See Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).)

It would have to stand idly by while a government prevented a grandmother from taking an orphaned grandson into her home. (*See Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977).)

It would not have recognized marriage as a fundamental right to be protected against unjustified laws interfering with its exercise by the poor or those in prison. (*See Zablocki* v. *Redhail*, 434 U.S. 374 (1976); *Turner* v. *Safley*, 107 S. Ct. 2254 (1987).)

The committee believes that Judge Bork's position on the right to privacy exposes a fundamentally inappropriate conception of what the Constitution means. Judge Bork's failure to acknowledge the "right to be let alone" illuminates his entire judicial philosophy. If implemented on the Supreme Court, that philosophy would place at risk the salutory developments that have already occurred under the aegis of that right and would truncate its further elaboration.

II. CIVIL RIGHTS

Throughout his career, Judge Bork has consistently expressed harsh criticism of, and opposition to, Supreme Court decisions and legislation securing civil rights for all Americans. The committee believes that Judge Bork's unfailing criticism of landmark developments advancing civil rights, and his marked failure in numerous writings and speeches to suggest alternative methods of securing those advances, reflect a pronounced hostility to the fundamental role of the Supreme Court in guarding our civil rights.

A. Judge Bork Has Opposed Civil Rights Legislation

The struggle to end race discrimination in America was one of the greatest moral tests faced by our Nation. In the 1960s, thoughtful men and women of all races and from all parts of the country came to realize that legislation was urgently needed to put an end to segregated lunch counters and "whites only" want ads.

In 1963 and 1964, while an associate professor at Yale Law School, Judge Bork vigorously and publicly opposed the legislation banning discrimination in employment and public accommodations that ultimately became Titles II and VII of the Civil Rights Act of 1964. In August 1963—the same month that Dr. Martin Luther King, Jr. lead the March on Washington to secure the passage of the Civil Rights Act—Judge Bork wrote in *The New Republic* that the principle underlying the proposed ban on discrimination in public accommodations was one of "unsurpassed ugliness." (*Civil Rights—A Challenge*, August 31, 1963, at 22.) And in a March 1, 1964 article in the *Chicago Tribune*, Judge Bork opposed both the public accommodations and the employment provisions of the bill because they would—in his words—"compel association even where it is not desired." (*Against the Bill*, at 1.) Judge Bork also asserted that there were "serious constitutional problems" with the public accommodations provision of the bill, a position unanimously rejected by the Supreme Court in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964).

At the time that Judge Bork's article in the *The New Republic* was published, Nicholas deB. Katzenbach was Deputy Attorney General of the United States. Mr. Katzenbach later served as Attorney General from 1964-1966. During his testimony, Mr. Katzenbach eloquently described the impact of that article:

> His 1963 article in *The New Republic* . . . is one that I remember very well. It was then, and is now, absolutely inconceivable to me that a man of intelligence and perception and feeling could have opposed that legislation on the grounds that it deprived people of freedom of association.
>
> It meant, and it could only have meant, that he valued the right of people in public situations to discriminate against blacks if that is what they chose to do. What kind of judgment does that demonstrate? (Comm. Print Draft, Vol. 1 at 870.)

As Judge Bork admitted during the hearings, he did not publicly modify his views about the Civil Rights Act until his 1973 confirmation hearings to be Solicitor General. (Comm. Print Draft, Vol. 1, at 126.) (*See Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General*, Hearings Before the Senate Committee on the Judiciary January 17, 1973, at 14.) While the committee does not question the sincerity of Judge Bork's recantation, we believe that his earlier strident and outspoken opposition to the public accommodations and employment provisions of the Civil Rights Act of 1964 may properly be taken into account in reaching our conclusion that the nominee lacks the sensitivity and commitment to assuring equal justice under law for all Americans that any Supreme Court Justice should possess.

B. Judge Bork Has Criticized the Decision Banning Enforcement of Racially Restrictive Covenants

In *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), the Supreme Court unanimously held that the Fourteenth Amendment prohibited enforcement of racially restrictive covenants in residential real property agreements. In his *Indiana Law Journal* article, Judge Bork was harshly critical of the *Shelley* decision, writing that it was "impossible" to justify that decision through application of neutral principles. ("Neutral Principles" at 17.)

During his testimony, Judge Bork repeated his criticism of the *Shelley* decision, but sought to undercut the significance of that criticism by stating:

> Shelley against Kraemer has never been applied again. It has had no generative force. It has not proved to be a precedent. As such, it is not a case to be reconsidered. It did what it did; it adopted a principle which the Court has never adopted again. And while I criticized the case at the time, it is not a case worth reconsidering. (Comm. Print Draft, Vol. 1, at 86.)

In fact, *Shelley* has been applied by the Supreme Court in many later decisions, including *Barrows* v. *Jackson*, 346 U.S. 249 (1953) (barring award of damages for breach of racially restrictive covenant); *Moose Lodge* v. *Irvis*, 407 U.S. 163, 171, 179 (1972); and *Palmore* v. *Sidoti*, 466 U.S. 429, 432 n.1 (1984).

In light of Judge Bork's harsh criticism of *Shelley*, the committee entertains substantial doubt as to whether and how the nominee would apply that fundamental decision in future cases.

C. Judge Bork Has Rejected the Decision Banning School Segregation in Washington, D.C.

In *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Supreme Court held that the Due Process Clause of the Fifth Amendment prohibited school segregation in the District of Columbia. In so doing, the Court ruled that the concept of "liberty" enshrined in the Due Process Clause contained a requirement that the federal government ensure that no person is denied the equal protection of the laws.

During his testimony before the committee, Judge Bork indicated that he thought that *Bolling* was wrongly decided, stating "I think that constitutionally that is a troublesome case. . . ." and "I have not thought of a rationale for it." (Comm. Print Draft, Vol. 1, at 262–63.) (Judge Bork, indicated, however, that he would never "dream of overruling" the decision. *Id.* at 264.)

Judge Bork's view that *Bolling* was wrongly decided leaves open to doubt whether he would *ever* hold that the federal government is prohibited from denying persons the "equal protection of the laws." It would appear from Judge Bork's criticism of *Bolling* that he might well hold that there is no constitutional basis on which to challenge discrimination by the federal government.

D. Judge Bork Has Criticized the Poll Tax Decision

For many years, poll taxes were used to keep poor, largely minority, persons from exercising their fundamental right to vote. In *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1964), the Supreme Court struck down poll taxes, holding that:

> [A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying this or any other tax. (*Id.* at 666; footnote omitted.)

During his 1973 confirmation hearings, Judge Bork testified that "as an equal protection case, [*Harper*] seemed to me wrongly decided." (Solicitor General Hearings at 17.) When asked whether he thought *Harper* had contributed to the welfare of the nation, Judge Bork responded:

> I do not really know about that. . . . As I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the nation one way or the other. (*Id.*)

Judge Bork then indicated that the constitutional issue "is a question of degree[,] [i]t depends on the size of the tax." (*Id.*) Judge Bork repeated his criticism of *Harper* in a 1985 essay. (*See* "Foreword" in G. McDowell, *The Constitution and Contemporary Theory* vii (1985).)

In his testimony before the committee. Judge Bork reiterated his view that the Supreme Court was wrong in the *Harper* case to hold that poll taxes are unconstitutional in the absence of an express showing of racial discrimination. (Comm. Print Draft, Vol. 1 at 128-29; 363, 430–31, 530–31.) Senator Heflin's colloquy with Judge Bork on this issue is informative:

> Senator HEFLIN. Well, you know, I have looked back on a lot of decisions, but this poll tax . . . gives me concern. You basically . . . say that it was not discriminatory.
>
> Judge BORK. There was no allegation of discrimination in that case.
>
> Senator HEFLIN. There was no allegation? Is that the distinction you made? **Because there is no question to me that a poll tax that required three years of history of payment, that the last payment had to be six months in advance, and you had to go to the courthouse to pay it was designed to prevent the poor and blacks from voting. I do not think there is any question that that is it.**
>
> Judge BORK. Senator, I did not discuss the case in those terms, and the Supreme Court did not discuss the case as one in which a poll tax that was designed to keep blacks from voting. (Comm. Print Draft, Vol. 1, at 431–32; emphasis added.)

And as Vilma Martinez testified: "Among the problems with Judge Bork's disagreement with *Harper* is the fact that the Supreme Court in its decision expressly recognized that the 'Virginia poll tax was born of a desire to disenfranchise the Negro.' *Harper,* 383

U.S. at 666 n.3." (Comm. Print Draft. Vol. 3, at 2157; *see generally id.* at 2157–59.)

Ms. Martinez also identified another problem with Judge Bork's criticism of *Harper:*

> Even if the poll tax laws struck down in *Harper* and in . . . other cases had not been racially motivated, Judge Bork's criticism of *Harper* as being wrongly decided is worrisome for another reason, *i.e.,* that he believes that financial and property restrictions on the fundamental right to vote are perfectly consistent with his view of the equal protection clause. If so, Judge Bork disagrees with settled equal protection law holding that states may not restrict the fundamental right to vote to owners of real property. . . . (Comm. Print Draft, Vol. 3, at 2159; citations omitted.)

The committee strongly believes that in a democratic society, no person should be denied the fundamental right to vote because he or she is too poor to pay a poll tax. Judge Bork's criticism of the *Harper* decision striking down poll taxes reflects a pronounced lack of sensitivity to how the law affects real persons.

E. Judge Bork Has Criticized the One Person, One Vote Decisions

In a line cases extending from *Baker* v. *Carr,* 369 U.S. 186 (1962), and *Reynolds* v. *Sims,* 377 U.S. 533 (1964), the Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment requires that state and local legislative districts be apportioned in accordance with the one person, one vote principle. Judge Bork has been extremely critical of the Supreme Court's one man, one vote decisions, writing in 1968 that "on no reputable theory of constitutional adjudication was there an excuse for the doctrine [they] imposed." ("The Supreme Court Needs A New Philosophy," at 166.) At his 1973 confirmation hearings, Judge Bork repeated this criticism, stating:

> [O]ne man, one vote was too much of a straitjacket. I do not think there was a theoretical basis for it. (Solicitor General Hearings at 13.)

And in an interview on June 10, 1987, Judge Bork stated:

> I think [the] Court stepped beyond its allowable boundaries when it imposed one man, one vote under the Equal Protection Clause. That is not consistent with American political history, American political theory, with anything in the history or the structure or the language of the Constitution. (*Worldnet Interview,* United States Information Agency, June 10, 1987, Tr. at 22–23.)

Before the committee, Judge Bork adhered to these views quite vigorously, stating that "as an original matter, [the one man, one vote principle] does not come out of anything in the Constitution. . . ." (Comm. Print Draft, Vol. 1, at 136.)

As former Congresswoman Barbara Jordan so eloquently testified, the Supreme Court's one person, one vote decisions opened up the political process for millions of Americans whose votes had

been diluted by malapportioned legislatures. Representative Jordan described her experience as follows:

> I filed for the election to the Texas House of Representatives. I ran. I lost. But I got 46,000 votes. I was undaunted. I said I will try again because my qualifications are what this community needs. So in 1964, I ran again . . . . I lost. But I got 64,000 votes.
>
> Why could I not win? I will tell you why. The Texas legislature was so malapportioned that just a handful of people were electing a majority of the legislature. I was trying to play by the rules, and the rules were not fair. But something happened. A decision was handed down: *Baker* v. *Carr*. That decision said this: The complainant's allegations of a denial of equal protection present a justiciable constitutional cause of action. The right asserted is within the judicial protection of the Fourteenth Amendment.
>
> Following *Baker* v. *Carr*, a series of cases were decided. The Texas legislature was required, mandated by the Supreme Court to reapportion itself. It reapportioned. So in 1966, I ran again. The third time. This time, in one of those newly created State senatorial districts, I won. (Comm. Print Draft, Vol. 1, at 785–86.)

During his testimony, Judge Bork demonstrated a lack of understanding of the harm created by malapportioned legislatures. He suggested that "if the people of this country accept one man, one vote, that is fine. They can enact it any time they want to." (Comm. Print Draft, Vol. 1, at 131.) Once again, former Representative Jordan summarized the problem in compelling terms:

> Now you know what Judge Bork would say. "Listen. I approve of the results of the reapportionment cases. I approve of the outcome in many of these cases, but my problem with the whole matter is that I don't like the reasoning which was used."
>
> Well, let's look at that for the moment. A Borkian view. "Don't like the reasoning that was used. Approve of the outcome. What you really ought to do is let the democratically elected bodies make these decisions. That is the proper way to proceed."
>
> Gentlemen, when I hear that, my eyes glaze over. If that were the case, I would right now be running my 11th unsuccessful race for the Texas House of Representatives. I cannot abide by that. (Comm. Print Draft, Vol. 1, at 787; *see also* Martinez statement, Comm. Print Draft, Vol. 3, at 2161–62.)

The committee believes that the American people accept the one person, one vote principle as a fundamental component of constitutional equality. Judge Bork's persistent failure to accept this fundamental principle, we believe, demonstrates a deeply rooted hostility to the role of the courts in protecting individual rights and the integrity of the political process.

F. Judge Bork Has Criticized Decisions Upholding a Ban on Literacy Tests

Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions" of that Amendment. Invoking its authority under Section 5, the Congress in 1965 and 1970 adopted provisions of the Voting Rights Act banning literacy tests in certain instances. These provisions were upheld by the Supreme Court in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). The Court held in those cases that Congress had the power to determine that requiring literacy tests in specific instances deprived voters of the equal protection of the laws, even though the Supreme Court had held in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959), that such tests were not *per se* unconstitutional. The Supreme Court has relied on this reading of Section 5 to uphold a key provision of the Voting Rights Act. *See City of Rome* v. *United States*, 446 U.S. 156 (1980).

In prior testimony before this committee, Judge Bork has described *Katzenbach* and *Orgeon* v. *Mitchell* as "very bad, indeed pernicious, constitutional law." (Human Life Bill Hearings at 315; *see also* Solicitor General Hearings at 16) (describing *Katzenbach* as incorrect); Untitled Speech, Seventh Circuit (1981) at 5 (describing *Katzenbach* as "terrible law").) During the hearings on this nomination, Judge Bork adhered to his criticism of *Katzenbach*, describing it as "bad constitutional law." (Comm. Print Draft, Vol. 1, at 228, *see also id.* at 323–26.)

Judge Bork testified that the ruling in *Katzenbach* is flawed because "the Constitution would be meaningless if Congress could alter it by a mere statute." If *Katzenbach* means this, it would, in Judge Bork's view, directly conflict with *Marbury* v. *Madison*, which enunciated the principle that the judiciary must "say what the law is." However, *Katzenbach* is itself an instance of the Supreme Court saying what the law is—in this case saying that Section 5 of the Fourteenth Amendment grants Congress the authority to implement the Fourteenth Amemdment as it did. Senator Metzenbaum and Professor Tribe discussed the question:

> Senator METZENBAUM. Would you . . . tell us whether you agree with Judge Bork that *Katzenbach* is inconsistent with *Marbury* v. *Madison*? .
>
> Mr. TRIBE. Senator, I do not agree with Judge Bork . . . The basic question relates to the whole purpose of the Civil War Amendments. They were designed to secure equality and freedom, but they were designed by people who knew the courts could not perform the task alone.
>
> That is why they contain enforcement provisions saying that Congress can enforce the provisions of these amendments, including the Fourteenth, by all reasonably necessary legislation.
>
> That is exactly what Congress tried to do in a case like *Katzenbach* v. *Morgan*. . . . Now one can disagree with how wise that legislation is. . . . But what I do not think you

can say in a credible way is that Congress was just ripping up and rewriting the Constitution.

The reason I would stress this is it does seem to me a bit strange that someone who is deferential to the will of the majority, someone who believes in letting majorities rule—as Judge Bork does—would be so activist as to strike down rational Congressional legislation enforcing the Fourteenth Amendment. (Comm. Print Draft, Vol. 2, at 54.)

The *Katzenbach* decision is susceptible of a number of interpretations—ranging from the "broad" view that the Congress has the power to interpret the Constitution to extend the scope of rights beyond that recognized by the Supreme Court, to the narrower view that Congress has the power to enact prophylactic rules to forbid practices that the Court would find violate the Constitution in particular instances. We need not choose from among these interpretations to be alarmed by Judge Bork's exceedingly narrow reading of Congress's authority under Section 5. Judge Bork's views that the *Katzenbach* case was wrongly decided would severely restrict Congress's authority under section 5 to enforce the Fourteenth Amendment.

* * * * * * *

Americans are rightly proud of the great strides our country has made in the past 40 years toward achieving our constitutional commitment to equal justice under law. The dramatic progress was eloquently described at the hearings by the Mayor of Atlanta, Andrew Young:

The success we enjoy—the cooperation between the races, the economic prosperity—has been built upon the foundation of civil rights and equal opportunity which the United States Supreme Court has fostered for three decades. Today, I can be Mayor of Atlanta. Yet just a few decades ago, as a college student, I could not stop for gas at many service stations, was told to use "separate" rest rooms and could not stay or be served in downtown hotels and restaurants. Just 25 years ago, black Americans were second-class citizens in the City of Atlanta. And white citizens were struggling with a stagnant economy.

But today, many people recognize our city as "the city too busy to hate." We are a city busy providing jobs, developing and protecting the environment, expanding our economy, educating our youth and opening the doors of opportunity for all our citizens. (Statement of Mayor Andrew Young, Comm. Print Draft, Vol. 1, at 813.)

After reviewing the totality of Judge Bork's record on civil rights, former Secretary of Transportation William T. Coleman, Jr. summarized the nominee's views as follows:

At almost every critical turning point in the civil rights movement as exemplified in these cases, Judge Bork has, as a public speaker and scholar, turned the wrong way. (Coleman statement, at 26–7.)

Similarly, Professor Burke Marshall, who served as Assistant Attorney General in charge of the Civil Rights Division from 1961-1965, expressed grave concern about the totality of Judge Bork's views on the Supreme Court's landmark civil rights cases:

> [I]t is not my purpose to criticize Judge Bork for his views about any single one of these decisions. No doubt there is something to his views in each case, considered separately. No doubt there is indeed some arguably valid ground on which any Supreme Court decision can be described as incompletely or wrongly reasoned. The real concern is with the tenor, the tone and the substance of Judge Bork's discussion of these matters. It seems to show no awareness, no understanding of the enormity and the scope of the system of racial injustice that was implemented by law in this country. And that insensitivity has to do importantly with what is wrong, both historically and in terms of constitutional purpose, with Judge Bork's ungenerous concept of the role of the federal judiciary, and especially the Supreme Court, under the equal protection clause and the other provisions of the Civil War Amendments. It was the judiciary, followed by the executive, and followed again by the Congress, with its action in turn legitimated and fortified by the judiciary that enabled this nation finally to confront and to resolve under law the terrible burdens of racial oppression. . . . Judge Bork's reaction to racial issues, and his whole concept of the constitutional role of the judiciary, would have stifled rather than supported the accomplishments of the period. (Marshall statement, Comm. Print Draft, Vol. 1, at 842.)

In short, Judge Bork has consistently criticized legislation and Supreme Court decisions advancing civil rights for all Americans.

To be sure, Judge Bork was not the only opponent of the Civil Rights Act of 1964, and some of the decisions he criticized were not unanimous. But Judge Bork's criticism of and opposition to the broad number and variety of civil rights achievements discloses a troubling pattern. In the committee's view, this persistent pattern of criticism of civil rights advances, coupled with a conspicuous failure to suggest alternative methods for achieving these critical objectives, reflects a certain hostility on Judge Bork's part to the role of the courts in ensuring our civil rights. The committee's reaction to Judge Bork's long record of criticism of the country's achievements in the field of civil rights was exemplified by Senator Kennedy's comment to Judge Bork:

> With all your ability, I just wish you had devoted a little of your talent to advancing . . . equal rights rather than criticizing so many of the decisions protecting rights and liberties. Lawyers can always make technical points, but [a] justice ought to be fair. (Comm. Print Draft, Vol. 1, at 132.)

In light of Judge Bork's demonstrated hostility to the fundamental role of the courts in protecting civil rights, the committee strongly believes that confirming Judge Bork would create an un-

acceptable risk that as a Supreme Court Justice, he would reopen debate on the country's proudest achievements in the area of civil rights and return our country to more troubled times.

III. THE EQUAL PROTECTION CLAUSE AND GENDER DISCRIMINATION

The words of the Equal Protection Clause are grand but general: "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." One of the more troubling aspects of Judge Bork's philosophy of equality under the Constitution is his application of the general language of the Clause to discrimination on the basis of gender.

The committee explored two principal questions with Judge Bork on this issue. First, does he believe that the Equal Protection Clause applies to women? Second, by what standard should a court evaluate a challenge to a law that discriminates between men and women? The committee finds that Judge Bork's philosophy—as expressed both before and during the hearings—raises very serious concerns.

A. Prior to the Hearings, Judge Bork Did Not Include Women Within the Coverage of the Equal Protection Clause

Prior to the hearings, Judge Bork engaged in a sustained critique of applying the Equal Protection Clause to women. He argued that to extend the Clause to women departs from the original intent of the Fourteenth Amendment, produces unprincipled and subjective decision-making and involves the courts in "enormously sensitive" and "highly political" matters.

In 1971, for example, then-Professor Bork said that "cases of race discrimination aside, it is always a mistake for the court to try to construct substantive individual rights under the . . . equal protection clause" and that "[t]he Supreme Court has no principled way of saying which non-racial inequalities are impermissible." ("Neutral Principles" at 17, 11.)

Judge Bork reiterated that position more than 10 years later, after ascending to the bench:

> We know that, historically, the Fourteenth Amendment was meant to protect former slaves. It has been applied to other racial and ethnic groups and to religious groups. So far, it is possible for a judge to minimize subjectivity. But when we abandon history and a very tight analogy to race, as we have, the possibility of principled judging ceases. (Untitled Speech, *Catholic University,* March 31, 1982 at 18-19.)

In this same speech, Judge Bork insisted that the courts were not competent to decide which legislative attitudes toward women were legitimate judgments, and which were outmoded stereotypes:

> There being no criteria available to the court, the identification of favored minorities will proceed according to **current fads in sentimentality**. . . . This involves the judge in deciding which motives for legislation are respectable and

> which are not, a denial of the majority's right to choose its own rationales. (*Id.* at 18., emphasis added.)

One month later, he repeated this objection again, complaining about the "extension of the Equal Protection Clause to groups . . . that were historically not intended to be protected by that clause." ("Federalism and Gentrification," *Yale Federalist Society,* April 24, 1982, at 9.)

As recently as June 10, 1987, less than a month before his nomination, Judge Bork reiterated his view:

> I do think the Equal Protection Clause **probably should have been kept to things like race and ethnicity.** . . . When the Supreme Court decided that having different drinking ages for young men and women violated the equal protection clause [in *Craig* v. *Boren,* 429 U.S. 190 (1976)], I thought that was . . . to **trivialize the Constitution** and to spread it to areas it did not address. (*Worldnet Interview,* June 10, 1987, at 12; emphasis added.)

B. Judge Bork's Testimony at the Hearings Was His First Publicly Expressed Approval of Including Women Within the Scope of the Equal Protection Clause

During his testimony, Judge Bork publicly stated for the first time that he now believes that the Equal Protection Clause should be extended beyond race and ethnicity, and should apply to classifications based on gender. According to Judge Bork, "[e]verybody is covered—men, women, everybody." (Comm. Print Draft, Vol. 1, at 230.) Judge Bork explained that all forms of governmental classifications were unconstitutional unless they had a "reasonable basis." (*See, e.g.,* Comm. Print Draft, Vol. 1, at 135, 230, 231, 306, 309.) He also said that he would reach the same results that the Supreme Court had reached in virtually all of its recent sex discrimination cases. (*See e.g.,* Comm. Print Draft, Vol. 1, at 306; 309.) Finally, Judge Bork testified that his standard was the same as that utilized by Justice Stevens.

Judge Bork's rationale for his change in position was that the Equal Protection Clause should be interpreted according to evolving standards and social mores about the role of women:

> As the culture changes and as the position of women in society changes, those distinctions which seemed reasonable now seemed outmoded stereotypes and they seem unreasonable and they get struck down. That is the way a reasonable basis test should be applied. (Comm. Print Draft, Vol. 1, at 135.)

C. Judge Bork's "Reasonable Basis" Standard Does Not Provide Women with Adequate Protection and Is Not the Standard Used by Justice Stevens

A comparison of Judge Bork's pre-hearing views and his hearing testimony is striking. Putting aside the apparent change in views, his position that the Equal Protection Clause covers women does not go to the heart of the debate over the Court's role in reducing gender discrimination. The central debate concerns the standard of

equal protection that should apply in such cases. Importantly, that standard is a presumptive guide to courts to use in evaluating claims of gender-based discrimination. The pertinent question is thus whether Judge Bork's currently expressed position would adequately protect women from such discrimination. For several reasons, the committee believes that it would not.[7]

1. The "Reasonable Basis" Test Has Previously Been Used to Uphold Discriminatory Legislative Classifications

Prior to the 1970s, the Supreme Court used a "reasonableness" concept to uphold a variety of legislative classifications based on gender. As Professor Sylvia Law testified, "Reasonable basis has been a standard that has upheld state power to draw lines, to discriminate if you will, if any state of facts can reasonably be conceived that would sustain the law." (Comm. Print Draft, Vol. 2, at 938.)

In 1873, for example, the Supreme Court found it reasonable to exclude women from the practice of law. (*Bradwell* v. *Illinois,* 83 U.S. 130, 140–42 (1873).) In 1924, the Court found no "unreasonable . . . classification" in a law that excluded women, "considering their more delicate organism," from late-evening restaurant employment. (*Radice* v. *New York.* 264 U.S. 293, 294, 296 (1924).) And in 1961, a unanimous Supreme Court found a state's exemption of women from jury service (unless they volunteered) to be based on a "reasonable classification" in light of how, "[d]espite [their] enlightened emancipation," women are "still . . . the center of home and family life." (*Hoyt* v. *Florida,* 368 U.S. 57, 61–62 (1961).) Thus, under a reasonableness standard, the Court upheld state laws reflecting a level of blatant discrimination that is offensive to the ideals of equality that we as a society hold today.

As Professor Sylvia Law concluded:

> [I]n Supreme Court jurisprudence of the past 100 years, reasonable basis has been a standard that has upheld state power to draw lines, to discriminate, if you will, if any state of facts can reasonably be conceived that would sustain the law. . . . Since 1971, the Supreme Court has refused to apply that deferential reasonable basis standard to laws that discriminate on the basis of sex. The Court has made this change because it recognized that women and other groups have historically been subject to irrational prejudice. Law affecting such groups must be scrutinized carefully. (Testimony of Sylvia Law, Comm. Print Draft, Vol. 2, at 938.)

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[7] Carla Hills, former Secretary of the Department of Housing and Development, testifying on Judge Bork's behalf, concluded that Judge Bork is "likely to be a strong supporter of women's rights'" and that his view on gender discrimination is "similar to that of many feminists such as Herma Hill Kay, Lucinda Findley, and Mary Becker." (Comm. Print Draft, Vol. 2, at 100.) After that testimony, each of the scholars mentioned contacted the committee in writing or testified, and flatly denied that there was any similarity. (Comm. Print Draft, Vol. 3, at 1545; id. at 1645–46.)

2. Judge Bork's Willingness to Defer to Statistically-Based Generalizations Demonstrates the Weakness of His Standard

Judge Bork's testimony on the Court's decision in *Craig* v. *Boren*, 429 U.S. 190 (1976), provides particular insight into the weakness of his standard. In *Craig*, the Court struck down an Oklahoma statute that allowed women to obtain beer at age 18 but did not allow men to do so until they were 21. During his testimony, Judge Bork explained why he thought that the classification would be upheld using a reasonable basis test: The law, he said, "[p]robably is justified **because they have statistics**. . . . [T]hey had evidence that there was a problem with young men drinking more than there was with young women drinking." (Comm. Print Draft. Vol. 1. at 369; emphasis added.) According to Judge Bork, therefore, sex-based treatment should have been allowed because it rested upon a generalization supported by statistics.

Several witnesses testified about the serious problems associated with relying on statistical generalizations. Professor Dellinger stated that "[i]f you allow statistical generalizations to determine the fate of individuals . . . you have made a major inroad undercutting the protection of women against discrimination." (Comm. Print Draft, Vol. 2, at 743.) He explained:

> Take, for example, a case in which an employer finds that women with preschool-aged children statistically . . . have more employment-related problems than men with preschool-aged children. . . . The approach that Judge Bork is suggesting would allow the Court to sustain discriminating against an individual woman applicant . . . because you have aggregate group statistics, generalizations about women. And I think that could be very damaging. (*Id.*)

In Professor Gewirtz's view, Judge Bork's test "focusses on the accuracy of a statistical **generalization** about men and women, not whether the **generalization** is true for individual men and women." (Gewirtz statement, Comm. Print Draft, Vol. 2, at 1193; emphasis in original.) Furthermore,

> "[r]easonable basis," as Judge Bork seems to understand it, allows a sex classification based on group averages, and ignores the unfairness to individual women who don't fit the generalization but who are lumped together with others of their sex. Judge Bork's standard is not sensitive to the essence of discrimination—making distinctions between people based on group generalizations that are not accurate as applied to them individually. (Comm. Print Draft, Vol. 2, at 1193–94; *see also* testimony of Professor Wendy Williams, at 7.)

3. Despite Judge Bork's Attempt to Equate His Standard with that of Justice Stevens, the Two Are Markedly Different

The difference between the standards utilized by Judge Bork and Justice Stevens is illustrated by the varied approaches taken by each to *Craig* v. *Boren*. Concurring in *Craig*, Justice Stevens agreed

with the majority that the Oklahoma law should be struck down. As explained by Professor Williams, Justice Stevens rejects the use of statistical generalizations:

> Where Judge Bork saw a ten-fold difference in drunk driving arrests between young men and young women—2 percent of the men but only .18 percent of the women were arrested—Justice Stevens sees the 98 percent of young men and 99.2 percent of young women—the vast majority of both sexes—who do not show up in the statistics. To him, it was sex discrimination to hold all young men between 18 and 21 accountable for the driving sins of two percent of them. (Williams testimony, Comm. Print Draft, Vol. 2, at 958) *see also* Dellinger Testimony, Comm. Print Draft, Vol. 2, at 743–44.)

The "vast gulf between the jurisprudence of Justice Stevens and the new theory of Judge Bork," (Law Testimony, Comm. Print Draft, Vol. 2, at 939), runs even deeper than their differences in *Craig*. Justice Stevens has in fact joined numerous opinions clearly establishing heightened judicial scrutiny in cases of alleged sex discrimination, requiring that any legal discrimination between men and women be closely "tailored to further an important governmental interest," and not simply that it be "reasonable." (*Kirchberg* v. *Feenstra*, 450 U.S. 455, 460 (1980).) Importantly, Justice Stevens agreed with Justice O'Connor in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724–25 (1982), in which the Court, striking down gender discrimination in medical schools, held that significantly heightened scrutiny is vital in all gender cases.

Furthermore, while Justice Steven has used the phrase "rational basis" periodically in discussing equal protection, it is clear that his approach is not the same as that proffered by Judge Bork during the hearings. Justice Stevens has described what he means by "rational basis" in this way:

> The term "rational" . . . includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially. *(City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring).)

In fact, Justice Stevens builds into his standard an even more demanding requirement: He asks not simply whether an "impartial lawmaker" would view the law as rational, but also whether "a member of [the] class of persons" disadvantaged by the challenged law, would so view it. (*Id.*)

Justice Stevens's notion of "rational basis," thus, "is obviously very different from simply asking whether the government has the 'statistics' to justify the accuracy of a generalization." (Gewirtz statement, Comm. Print Draft, Vol. 2, at 1194; footnote omitted.)

4. Judge Bork's "Reasonable Basis" Test Cannot be Explained in Terms that Are Consistent with His Original Intent Framework and Is Contrary to His Own Guidelines for Judicial Decision-Making

The standard articulated by Judge Bork during his testimony seems unmoored from his basic methodology. "[N]othing about . . . [Judge Bork's standard] can be explained in terms of the text of the document [the Constitution] or the 'original intent' of the Framers of ratifiers of the Fourteenth Amendment. from which Judge Bork woud derive his warrant as an enforcer of the Constitution." (Tribe statement, Comm. Print Draft, Vol. 2 at 28.) And as Professor Gewirtz asks rhetorically: "How can an 'originalist' who believes that the 14th Amendment was not intended to embody a principle concerning sex equality find a warrant to displace a legislature's use of sex classifications?" (Gewirtz statement, Comm. Print Draft, Vol. 2, at 1195.)

Furthermore, Judge Bork's "reasonable basis" test seems to be at odds with his own decision-making framework, which seeks to minimize a judge's subjective preferences and values. "It is hard to imagine a more vague and unpredictable standard than asking whether there is a 'reasonable basis' for a law." (Gewirtz statement, Comm. Print Draft, Vol. 2. at 1195.) Accordingly, Judge Bork's standard appears to invite precisely the kind of unstructured decision-making that his writings of many years argue against.

* * * * * * *

Prior to the hearings, Judge Bork said on several occasions—most recently, less than one month before his nomination—that the Equal Protection Clause of the Fourteenth Amendment should not be applied to women. At the hearings, Judge Bork announced for the first time that he would apply the Clause to women pursuant to a "reasonable basis" standard. The committee agrees with Senator Specter's statement that there is

> substantial doubt about Judge Bork's application of this fundamental legal principle where he has over the years disagreed with the scope of coverage and has a settled philosophy that constitutional rights do not exist unless specified or are within original intent. (Statement of Senator Specter, October 1, 1987, Cong. Record, S 13318.)

And as Professor Williams, focusing on Judge Bork's standard of review, concluded:

> Judge Bork's view on women's equality under the Constitution makes his nomination for a position on the highest court in the land a matter of deep uneasiness for persons concerned with the equality of the sexes. (Williams testimony, Comm. Print Draft, Vol. 2, at 956.)

IV. FIRST AMENDMENT

In 1971, while a professor at Yale Law School, Judge Bork wrote his now famous *Indiana Law Journal* article entitled "Neutral Principles and Some First Amendment Problems." In his analysis

of the First Amendment, Judge Bork reached the following rather striking conclusion:

> Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law. ("Neutral Principles" at 20.)

The committee explored each of the First Amendment issues raised by this statement and the manner in which Judge Bork has modified his First Amendment views.

A. Dissident Political Speech

1. Prior to the Hearings, Judge Bork Flatly Rejected the Holmes and Brandeis "Clear and Present Danger" Test and the Supreme Court's Formulation of that Test in *Brandenburg* v. *Ohio*

During World War I and the Red Scare period that followed, the Supreme Court began to consider the conditions under which political speech that calls for law-breaking or violence could be prohibited. Although a majority of the Court at that time held that such speech could be suppressed even though there was no immediate threat of law-breaking or violence, (*see Abrams* v. *United States,* 250 U.S. 616 (1919) and *Gitlow* v. *New York,* 268 U.S. 652 (1925)), Justices Holmes and Brandeis wrote stirring and historic dissents. Their dissenting view—that the Constitution allows political speech to be stopped only when there is a "clear and present danger" of violence or law-breaking—began to be adopted by the Supreme Court in the 1950s, and a similar but somewhat more stringent test eventually was accepted by a unanimous Supreme Court in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969). The Court held in *Brandenburg* that speech calling for violence or law-breaking could be forbidden only if such speech called for, and would probably produce, "imminent lawless action." This standard, therefore, addresses the nature of the speech itself and the chance that, realistically, it will lead to any harm under the circumstances in which it was uttered. Prior to the hearings, Judge Bork made three separate attacks on the *Brandenburg* decision and its underlying doctrine.

First, in his 1971 *Indiana Law Journal* article, then-Professor Bork removed from the protection of the First Amendment "any speech advocating the violation of law," even if it presents no danger of violence or law-breaking. ("Neutral Principles" at 31.)

Second, in a 1979 speech at the University of Michigan, he repeated that view and called *Brandenburg* a "fundamentally wrong interpretation of the First Amendment." (Michigan Speech at 21.) And he found that the Supreme Court's rule in *Brandenburg* did in fact come from the "clear and present danger" test: "The Holmes-Brandeis position . . . was imposed upon the First Amendment in

the last year of the Warren Court in *Brandenburg* v. *Ohio.*" (*Id.* at 20–21.)

Third, in a speech delivered to the Judge Advocate General's School two years after he became a judge, the nominee expressed his continuing displeasure with *Brandenburg,* which he defined as holding that "catatonic sentiments . . . could not be inhibited or punished in any way." ("The Constitution and the Armed Forces," *Judge Advocate's General School,* May 4, 1984, at 5–6.)

In his last pre-hearing statement on this issue, Judge Bork seemed to moderate his criticism of Supreme Court cases. He said in an interview with *Newsweek* after his nomination that Supreme Court rulings leave speech advocating law violation "quite clearly now . . . protected." (*Newsweek*, Sept. 14, 1987 at 33.) Judge Bork did not say that he approved of such rulings.

2. During the Hearings, Judge Bork First Said that He Agreed with *Brandenburg*, and Then that He Still Disagreed with It but Would Accept the Precedent as "Settled Law"

Judge Bork actually took two distinct positions at the hearings on advocacy of law-breaking, both of which were different from his previous position. The first time the issue arose, he stated that "the Supreme Court has come to the *Brandenburg* position—which is okay. . . . That is a good test." (Comm. Print Draft, Vol. 1, at 247.) And in answer to Senator Leahy's question, "At one point, you felt the *Brandenburg* case was a fundamentally wrong interpretation of the First Amendment. Today you feel it is right," Judge Bork answered, "It is right" and "the First Amendment also says that we will take that chance [that violence might occur]." (Comm. Print Draft, Vol. 1, at 249, 252.)

The next day, his answers were different. He told Senator Specter, "[o]n *Brandenburg*, I did not say my mind had changed. . . . I think *Brandenburg* may have gone too—went too far, but I accept *Brandenburg* as a judge and I have no desire to overturn it." (Comm. Print Draft, Vol. 1, at 409.) And immediately after he said: "It's settled law. That's all I've said. I haven't said that these writings [that is, his earlier criticisms of *Brandenburg*] were wrong." (*Id.*) Judge Bork reiterated this view for the remainder of his testimony.

In addition, in his testimony Judge Bork reiterated a distinction that he had suggested for the first time in an interview published immediately before the hearings (*U.S. News and World Report*, Sept. 14, 1987 at 22): "It seems to me that if the attempt [to advocate law violation] is by a person or a group to challenge the constitutionality of a law, then I do not see how it can be made illegal to advocate that attempt." (Comm. Print Draft, Vol. 1, at 247.) There are a number of problems with this exception.

First, until September 1987, Judge Bork had never made a distinction (in his 1971 article, or in his 1979 and 1984 speeches) between advocacy of testing the constitutionality of a law and subversive advocacy. Both were, without exception, termed "advocacy of law violation." And Judge Bork's rationale for this conclusion—that the "process of 'discovery and spread of political truth' is damaged or destroyed if the outcome is defeated by a minority that

makes law enforcement . . . impossible or less effective" ("Neutral Principles" at 31; *see also Michigan Speech* at 21)—applies equally to both types of advocacy.

Second, the exception is fraught with uncertainty. In answer to Senator Leahy's question, "What if they advocated the violation of a law to test its constitutionality and the constitutionality was upheld?", Judge Bork responded that "I really do not know how that would come out." (Comm. Print Draft, Vol. 1, at 247.) Such uncertainty means that the outcome of such a case would hinge not on the potentially criminal act itself but on an entirely independent constitutional determination.

Finally, Judge Bork's "test of constitutionality" exception is of more academic interest than real-world use. Dr. Martin Luther King, for example, did not advocate illegal sit-ins and other forms of civil disobedience in order to stimulate court tests. He advocated them to prick the conscience of the nation—to dramatize the injustice of segregation laws that were immoral but not necessarily unconstitutional. (*See* Young statement, Comm. Print Draft, Vol. 1, at 819-20.) In sum, Judge Bork's newly formulated exception is not simply new and uncertain, but is also a technical distinction with little concrete application.

3. Judge Bork's Changing Positions on *Brandenburg* Indicate that He Might Not Fully Apply this Vital Precedent

A major concern voiced by several members of the committee (particular by Senator Specter)—and voiced generally about those issues that Judge Bork accepted as "settled law"—was how he would apply doctrines of which he expressly disapproved in new cases with new facts. The committee finds several reasons for concern.

First, notwithstanding his acceptance at the hearings of the *Brandenburg* decision, Judge Bork was steadfast in his refusal to accept the "clear and present danger" doctrine on which *Brandenburg* was based. Senator Specter commented that this

> just seems surprising to me, that in the context where you characterize ["the clear and present danger"] doctrine as "fundamentally wrong" and attack the rationale as "frivolous," that you can, at the same time, say that you now accept the current Supreme Court interpretation. (Comm. Print Draft, Vol. 1, at 255.)

In subsequent testimony, Professor Marshall suggested how a judge could "accept" precedents while virtually restricting the application of such precedents to their original facts:

> [T]o say he accepts *Brandenburg* as precedent and at the same time denies the historic purpose of *Brandenburg* is an ambiguous position without quarelling. . . . And [in Judge Bork's view,] what is [*Brandenburg*] a precedent for is the question? It is the precedent for the fact that a statute, written as that Ohio statute was, which was based on the [criminal] syndicalism [law] that was declared constitu-

tional in Gitlow is no longer constitutional. (Comm. Print Draft, Vol. 1, at 832, 833.)

Second, Judge Bork stated that he saw *Cohen* v. *California*, 403 U.S. 15 (1971), and *Hess* v. *Indiana*, 414 U.S. 105 (1973), as obscenity cases because vulgar words were included in the political speech at issue in each. (Committee Print Draft, Vol. 1, at 251, 411.) In contrast, no member of the Court in either case (and *Cohen* was a unanimous decision) thought the vulgarity of the speech was in any way relevant to whether or not it was protected, and both decisions directly applied the rule of *Brandenburg*.

Professor Tribe described the ramifications of Judge Bork's characterization of these cases. It is not, Professor Tribe stated,

> even clear just what Judge Bork means by his "full acceptance of the Supreme Court's First Amendment jurisprudence," since **his own description** of that jurisprudence, as it presently stands, differs sharply from what virtually all commentators with whom I am familiar understand that jurisprudence to be. . . . If Judge Bork's version of the First Amendment, as he expressly affirms that he "accepts" it during these hearings, permits government to punish **even political speech**—which Judge Bork concedes lies at the First Amendment's core—whenever the speaker uses a single word that the government, or the local majority, deems vulgar or offensive, then the nominee's "full acceptance of the Supreme Court's First Amendment jurisprudence" cannot provide much solace to those who have read his many writings on the subject and come away fearful for this most basic of our freedoms. (Tribe testimony, Comm. Print Draft, Vol. 2, at 33-34; emphasis in original.)

Thus, there is great concern that in new cases, Judge Bork would find reasons not to apply the rules from decisions he dislikes but says are too "settled" to overturn completely. In other words, while he might not try to reverse those decisions, he could find them irrelevant or apply them in such a narrow way that their importance and effect would be greatly diminished.

Political dissidents who make statements that flirt with the edges of the law rarely make very appealing parties in a lawsuit. It is for precisely that reason that the basic values of our political system are seriously threatened in cases that involve the sometimes incendiary and generally unpopular speech of such dissidents. Our system is built upon the precept that any political speech, short of that which will produce imminent violence, furthers public understanding and national progress—sometimes, by showing the virtues of the existing system.

And sometimes dissident speech becomes the precursor of political change and ultimately, a new national consensus. Constitutional scholar Alpheus T. Mason offers a functional argument for great breadth in freedom of speech and related rights:

> Without equal opportunity to utilize the crucial preliminaries—speech, press, assembly, petition—the idea of government by consent of the governed becomes an empty declamation. Majorities . . . are in flux. Tomorrow's ma-

jority may have a different composition as well as different goals. Defense of the political rights of minorities thus becomes, not the antithesis of majority rule, but its very foundation. The majority must leave open the political channels by which it can be replaced when no longer able to command popular support. (*The Supreme Court: Palladium of Freedom* (University of Michigan Press, 1963) at 177-178.)

And Justice Oliver Wendell Holmes's classic dissent in *Abrams* v. *U.S.*—as noted, a position adopted years ago by the Supreme Court—provides the most expressive and stirring statement of the values at stake:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. (*Abrams* v. *United States,* 250 U.S. 616, 630 (1919).)

B. While Judge Bork's Testimony About First Amendment Protection for Art, Literature and Expressive Speech Was Somewhat Reassuring, it Nonetheless Must be Read Against the Background of His Prior Statements

1. Prior to the Hearings, Judge Bork's Views Left a Broad Area of First Amendment Expression Unprotected

In his 1971 *Indiana Law Journal* article, then-Professor Bork argued that the First Amendment only protected explicitly political speech. Judges should never intervene, he said, to "protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." ("Neutral Principles" at 20.) Judge Bork publicly recanted that view in his 1973 Solicitor General confirmation hearings, and indicated that he believed the First Amendment should have a somewhat broader scope.

In subsequent speeches and interviews, Judge Bork made clear that he no longer believed speech had to be clearly political to be protected by the First Amendment. Instead, he said that speech must be related to and "directly feed" the political process. For example, after identifying political speech as the core of the First Amendment, Judge Bork stated in a 1979 speech:

> But there is no occasion, on this rationale, to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but

are not on that account immune from regulation. (*Michigan Speech* at 8–9.)

In a 1985 interview, Judge Bork reaffirmed his view that certain wholly non-political, non-obscene expression was not protected by the First Amendment:

> I was arguing with . . . Harry Kalven about that, who said that you had to start from political speech and move on to literature until you get all the way out to paintings, statues, dancing and so forth—anything that's expressive is protected. That seems to me to be a level of generality which goes well beyond what the Framers intended. I doubt if they intended to protect some forms of dancing from regulation. ("Justice Robert H. Bork: Judicial Restraint Personified," *California Lawyer* (May 1985) at 26.)

On several occasions prior to the hearings, Judge Bork publicly backed away from his 1971 article (though not from the 1979 speech or 1985 interview). In a 1984 letter, he indicated that he would extend First Amendment protection to "many other forms of discourse, such as moral and scientific debate." (*American Bar Association Journal,* January 1984.) In 1987, he further extended this view to include fiction. (*Worldnet Interview* at 25.) In both cases, he indicated that the First Amendment extended to these areas of expression because they had some "relation to those [political] processes."

Prior to the hearings, Judge Bork never indicated that he would apply First Amendment protection to purely expressive, wholly non-political, non-obscene speech such as most paintings, statues, or dancing. In his last direct comments on this issue, in 1985, he stated directly that he disagreed with those who would extend First Amendment protection to those forms of expression.

Accordingly, under Judge Bork's views prior to the hearings, a broad area of expression traditionally viewed as included within the scope of the First Amendment would be unprotected. A Rubens painting could not be hung in a museum if the city council chose to prohibit it. The same would be true of a ban on performances by the Alvin Ailey Dance Troupe.

2. During the Hearings, Judge Bork Drew Back Substantially from His Prior Remarks

At the hearings, Judge Bork drew back substantially from his 1985 remarks. He explained that "if I was starting over again, I might sit down and draw a line that did not cover some things that are now covered," (Comm. Print Draft, Vol. 1, at 303.) but stated that he would "gladly" accept the Supreme Court's First Amendment decisions protecting non-political expression. Referring to the well-established principle that speech is protected regardless of its lack of relationship to the political process, Judge Bork said: "That is what the law is, and I accept that law." (Comm. Print Draft, Vol. 1, at 402.)

* * * * * * *

The committee finds that Judge Bork's testimony was somewhat reassuring on the question of First Amendment protection for non-

political speech. While his testimony was welcome, however, it "still must be read," in Senator Leahy's words, "against the background of Judge Bork's prior statements on the issue." (Statement on the Confirmation of Judge Robert Bork, Cong. Record, September 30, 1987, S 13128, S 13130.) As Senator Leahy concluded:

> Judge Bork may have long ago abandoned the "bright line" distinction between protected political and unprotected non-political speech, but his responses to interviewers as recently as this past May and June clearly state that the existence of First Amendment protection should be affected by where speech falls in relation to a "wavering line" between speech that feeds into the "way we govern ourselves" and speech that does not, a line that must be drawn on a "case by case basis."
>
> When he came before the Judiciary Committee, Judge Bork conceded that this line, whether bright or "wavering," is irrelevant to the scope of the First Amendment. By his confirmation testimony, Judge Bork accepted a consensus that has existed for decades. (*Id.* at S 13130.)

V. EXECUTIVE POWER

The Framers clearly recognized that unchecked power in the Executive Branch represents the greatest threat to individual liberty. The genius of the Constitution is perhaps most apparent in the separation of powers among the branches of government and in the system of checks and balances, carefully designed to ensure that no single branch would possess unlimited authority in any area.

In extensive writings and congressional testimony over the course of his professional career, Judge Bork has expressed a broad, almost limitless, view of presidential power, particularly with respect to the conduct of foreign affairs, and a correspondingly narrow view of Congress's ability to restrict abuses of that power. The committee believes that, when viewed as a whole, Judge Bork's views on the scope of executive power place him well outside of the mainstream of legal thought, and run directly contrary to the limits on executive power intended by the Framers.

A. Judge Bork Has a Restricted View of Congress's War Powers

The War Powers Act places certain limitations on the President's authority to send and maintain American military forces in hostile circumstances without congressional approval. In an article in the *Wall Street Journal*, Judge Bork stated that the War Powers Act "is probably unconstitutional and certainly unworkable." ("Reforming Foreign Intelligence," March 9, 1978, at 24.) During his appearance before the committee, Judge Bork adhered to this view, suggesting that both the Act's legislative veto provision, (Comm. Print Draft, Vol. 1, at 313, 697), and its provisions limiting the time during which troops may be introduced into a hostile situation without congressional approval, may be unconstitutional. (*Id.* at 697-698.)

The committee is well aware that as Commander-in-Chief, the President must have sufficient authority to pursue strategic objectives, free from "micro-management" of tactical decisions by the

Congress. But the Constitution makes abundantly clear that the power to declare war, and to define and limit the scope of a war, are reposed in the Congress. As University of Chicago Professor Cass Sunstein testified:

> The constitutional issue is not a simple one, and Judge Bork is correct in pointing to the President's power to make tactical decisions during a war. The Constitution, does, however, vest in the Congress the power "to declare war," and there is little in the history of the Constitution or the intent of the framers to forbid congressional controls of the sort involved in the War Powers Resolution. The Resolution does not in fact lead to "micro-management." Its purpose and effect are to ensure that Congress, rather than the President, decides whether the nation is to be at war. (Statement of Cass Sunstein, Comm. Print Draft, Vol. 3, at 1334.)

Judge Bork has also taken the position that when the United States is engaged in an undeclared conflict against one nation, Congress cannot constitutionally prohibit a President from expanding that conflict by commencing hostilities against another country. In a 1971 comment in the *American Journal of International Law*, Judge Bork wrote:

> I think there is no reason to doubt that President Nixon had ample Constitutional authority to order the attack upon the sanctuaries in Cambodia seized by the North Vietnamese and Viet Cong forces. That authority arises both from the inherent powers of the President and from Congressional authorization. **The real question in this situation is whether Congress has the Constitutional authority to limit the President's discretion with respect to this attack. Any detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trespass upon the powers the Constitution reposes exclusively in the President.** (65 Am. J. Int'l L. 79 (1971); emphasis added.)

Here again, Judge Bork manifests an exceedingly broad view of presidential power. As Professor Sunstein stated:

> Judge Bork's view appears to be that once a war has been authorized, the President has the inherent power to extend its reach if necessary, even though the judgment is inconsistent with the congressional declaration. In some circumstances, Judge Bork's position is probably correct; tactical judgments may enable the President to extend a war into other nations. But his broad and unqualified statements are somewhat disturbing. (Sunstein statement, Comm. Print Draft, Vol. 3, at 1330.)

Judge Bork's suggestion that the President has the inherent power to ignore such limitations is profoundly troubling. As former Senator Thomas F. Eagleton, an expert on Congress's powers with respect to war, testified:

> Judge Bork, with all of his purported adherence to "original intent," forgets that the Founding Fathers deliberately decided that matters relating to war and the use of American military forces are *shared* powers. . . . The Constitution gives Congress a grave responsibility in determining where and how American forces are to be deployed under threat of hostile action. . . . Judge Bork says: No, its all up to the President. I urge Judge Bork to read Article I, Section 8 of the Constitution, including the clauses, "Congress shall have Power . . . to declare War . . . and to make Rules for the Government and Regulation of the land and naval Forces." (Eagleton statement, Comm. Print Draft, Vol. 3, at 1308.)

B. Judge Bork Has a Narrow View of Congress's Power to Limit Intelligence Activities

Judge Bork has expressed an exceedingly narrow view of Congress's right to participate in or restrict intelligence activities, even when such activities are conducted in the United States against U.S. residents.

The Foreign Intelligence Surveillance Act generally requires the Executive Branch to obtain an order from a special court before electronic surveillance can be conducted in the United States against U.S. residents suspected of foreign intelligence activities. The Act was drafted under the supervision of former Attorney General Edward Levi, and it was passed by a vote of 95–1 with the overwhelming support of the intelligence community.

At hearings in 1978 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, Judge Bork testified—in direct contrast to the position of Attorney General Levi, under whom he served as Solicitor General—that he believed the legislation was unconstitutional:

> The plan of bringing the judiciary, a warrant requirement, and a criminal violation standard into the field of foreign intelligence is, when analyzed, a thoroughly bad idea, and almost certainly unconstitutional as well. . . . The law is very probably a violation of both Articles II and III of the Constitution. ("Foreign Intelligence Surveillance Act," Hearing, 95th Congress, 2nd Sess. (1978), at 130–131.)

With respect to Article II, Judge Bork stated that "Congress's constitutional role is largely confined to the major issues. . . . Congress . . . may not dictate the President's tactics in an area where he legitimately leads." (*Id.* at 132.) He stated that the legislation violated this principle, "by prescribing numerous details of the conduct of foreign surveillance, imposing the warrant requirement . . . and forcing upon the President the wholly inappropriate requirement that a federal criminal law be about to be violated before he may defend the nation's interests." (*Id.*)

With respect to Article III, Judge Bork indicated that there would be no "case or controversy" in the warrant proceedings and that the use of Article III cases in such proceedings would therefore be unconstitutional. ("Reforming Foreign Intelligence," *Wall Street Journal*, March 9, 1978, at 24, stating that the legislation re-

flects "a certain lightheadedness about the damage [intelligence] reform will do to indispensable constitutional limitations.")

During these confirmation hearings, Judge Bork appeared to persist in his view that the Foreign Intelligence Surveillance Act is unconstitutional. (Comm. Print Draft, Vol. 1, at 315.)

Judge Bork has also expressed the view that Congress lacks the constitutional authority to regulate the activities of the CIA. In a 1979 panel discussion at the American Enterprise Institute for Public Policy Research, he expressed great doubt about the constitutionality of legislation establishing a charter for the Central Intelligence Agency (CIA) that contained substantive limitations on the Agency's authority:

> A substantive [CIA] charter that says what will be prohibited and what will be allowed . . . would seem to be a congressional attempt to control the president's power in this respect. It verges upon unconstitutionality, and may well be unconstitutional, because the president has broad powers, as commander-in-chief and as the executive who conducts our foreign relations in this area. A congressional charter that told him what he could or could not do in detail would be an attempt to control his constitutional powers at the tactical level. (*Foreign Intelligence: Legal and Democratic Controls*, 8 (Amer. Ent. Inst. 1979).) (*See also* American Bar Ass'n, *Law Intelligence and National Security Workshop* 62 (1979), in which Judge Bork expressed the view that a CIA charter "is indeed unconstitutional.")

The committee finds Judge Bork's views on these questions to be extreme and quite troubling. Indeed, Professor Sunstein described Judge Bork's views on the Act's limitation on presidential power to conduct surveillance of foreign intelligence activities as "extremely adventurous and indeed quite curious." He continued:

> It is true, as Judge Bork suggests, that the President has discretionary power, under the Commander-in-Chief clause, to make tactical decisions during war. But to say this is not to suggest that Congress is without power to impose limitations on surveillance. Whether the President has the power to engage in surveillance without congressional authorization is itself a disputed and difficult question. But the key point here is that under the necessary and proper clause, limitations by Congress appear to fall plainly within legislative power. The President has no "inherent" authority, **in the face of a congressional judgment to the contrary**, to engage in surveillance activities. In some respects, Judge Bork's position here is his most idiosyncratic of all those [Professor Sunstein addresses]—and in greatest tension with judicial restraint and respect for precedent. (Comm. Print Draft, Vol. 3, at 1331–1332; emphasis in original.)

Reasonable people may differ about whether particular intelligence activities are appropriate or inappropriate. But under our constitutional system of checks and balances, Congress simply must

have the power to oversee and ultimately to control the ability of the Executive Branch to conduct intelligence operations. In light of the Framers' great concern about the risks presented by concentrated power in the Executive Branch, the committee finds Judge Bork's rejection of congressional limitations on such power particularly disturbing.

C. Judge Bork Has Said that the Special Prosecutor Legislation Is Unconstitutional

In November 1973, in the aftermath of the firing of Watergate Special Prosecutor Archibald Cox (*see* Section VI, *infra*), a number of measures were introduced in Congress to provide for establishment of an independent special prosecutor when allegations were made of wrongdoing by high-level Administration officials. Judge Bork testified that that legislation was unconstitutional. At that time, he told this committee:

> The question is whether congressional legislation appointing a special prosecutor outside the executive branch or empowering courts to do so would be constitutionally valid and whether it would provide significant advantages that make it worth taking a constitutionally risky course. I am persuaded that such a course would almost certainly not be valid, and would, in any event, pose more problems than it would solve. (*Special Prosecutor,* Hearings before the Senate Judiciary Committee, 450 (1973); *see also Grand Jury Legislation,* Hearings before the Subcommittee on Criminal Justice of the House Judiciary Committee, 252 (1973), in which Judge Bork repeated these views.)

During these confirmation hearings, Judge Bork sought to distance himself from these views by suggesting that the legislation about which he testified was significantly different from that ultimately adopted by Congress. (Comm. Print Draft, Vol. 1, at 316, 698.) But as Professor Sunstein testified:

> [T]he provision to which Judge Bork objected in 1973 is, in relevant part, *identical* to the provision now in effect. Judge Bork's principal objection was to judicial appointment of a special prosecutor. The provision for judicial appointment remains in current law, apparently on the understanding that the President should not be entrusted with appointing the person prosecuting his own high-level employees. (Comm. Print Draft, Vol. 3, at 1318–1319.)

Judge Bork's view that court-appointed independent counsels are unconstitutional is troubling because of his adherence to a rigid version of the separation of powers, without any regard for the practical accommodations that are inherent in our system of checks and balances. At rare times, the appearance of possible corruption within the upper levels of the executive branch threatens public confidence in government itself. In some instances, the impartial investigation by government officials of the executive branch, especially of those individuals who are politically or personally close to the President, seems impossible. Following the national trauma of Watergate, Congress faced up to that problem and

devised a balanced legislative solution—which has twice been reauthorized—that has significantly helped to restore public confidence. The series of constitutional arguments devised by Judge Bork against such incipient special prosecutor statutes is consistent with his willingness in other contexts to restrict Congressional power, and to enhance and protect the autonomy of the President.

D. Judge Bork Has Opposed the Notion of Congressional Standing to Challenge Presidential Actions

From time to time, members of Congress—and even the Senate itself—have had to bring lawsuits in federal court to challenge abuses by the President of Congress's constitutional prerogatives. Throughout his professional career, Judge Bork has expressed opposition to the notion that members of Congress, or the institution itself, have "standing" to maintain such actions.

While Solicitor General, Judge Bork decided not to seek Supreme Court review of the decision of the Court of Appeals for the District of Columbia Circuit in *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974), which held that a member of the Senate had standing to challenge an unconstitutional pocket veto on the ground that it had nullified his vote. In a January 26, 1976 memorandum to the Attorney General, then-Solicitor General Bork summarized the reasons for his failure to appeal the *Sampson* decision. After indicating that the Executive Branch was likely to lose on the merits and had changed its policy with respect to the use of pocket vetos, he stated:

> [W]e regarded the case to be a particularly inappropriate vehicle for presenting to the Supreme Court the question of congressional standing to sue—a question the Court obviously would have had to reach prior to dealing with the merits of the case. . . .
>
> [Pocket veto] cases are particularly poor vehicles for litigating the question of congressional standing to sue. The Supreme Court might be greatly tempted to hold that there is standing in order to reach the veto issue and settle it. **The dispute concerning congressional standing will, in the long run, pose a much more serious threat to traditional executive prerogative and to constitutional modes of governance than does acceptance of a narrowed scope of the pocket veto power. . . .** (Memorandum to the Attorney General from Solicitor General re: Pocket Vetos, January 26, 1976, at 10; emphasis added.)

After expressing doubts about the congressional standing doctrine in *Vander Jagt v. O'Neill,* 699 F.2d 1166 (D.C. Cir.), *cert. denied,* 464 U.S. 823 (1983),[8] Judge Bork urged complete abolition of congressional standing and overruling of *Kennedy v. Sampson* in his dissent in *Barnes v. Kline,* 759 F.2d 21 (D.C. Cir. 1985). At issue in *Barnes* was the constitutionality of President Reagan's attempt-

[8] Judge Bork's continuing animosity to the concept of congressional standing is apparent from his actions in *Vander Jagt v. O'Neill,* 699 F.2d 1166, *cert. denied,* 464 U.S. 823 (1983), which are discussed in Part Three, Section VIII, *infra*, and from his concurring opinion in that case. (*See* 699 F.2d at 1177–82.)

d pocket veto of a measure restricting aid to El Salvador. The Senate itself, along with 33 individual Members of Congress and the Bipartisan Leadership of the House of Representatives, brought uit to obtain a declaration that the measure had been duly enacted as law.

The panel majority held that the congressional plaintiffs had tanding based on the court's prior opinion in the *Sampson* case. udge Bork dissented, stating, quite bluntly, his belief that the ourts "ought to renounce outright the whole notion of congressionl standing." (759 F.2d at 41.) He described in harsh terms what he erceived to be the consequences of permitting congressional standng:

> [W]hen federal courts approach the brink of 'general supervision of government,' as they do here, the eventual outcome may be even more calamitous than the loss of judicial protection of our liberties. (*Id.* at 71, *quoting United States v. Richardson,* 418 U.S. 166, 192 (1974) (Powell, J., concurring).)

n response to questioning by Senator Byrd, Judge Bork adhered to he view he expressed in *Barnes.* He contended that his hostility to ongressional standing was premised on his concern that it could ead to a proliferation of lawsuits by any of the three branches of overnment, making the judiciary the "umpire." (Comm. Print raft, Vol. 1, at 544–545.) The colloquy between Senator Byrd and udge Bork is informative:

> Senator BYRD. So it is possible that Congress could be given standing?
>
> Judge BORK. Yes. It is possible in that kind of case [national security emergency]. I do not think in the routine case I would ever agree to it.
>
> Senator BYRD. So the statement, 'we ought to renounce outright the whole notion of Congressional standing,' you do not subscribe to that 100 percent today?
>
> Judge BORK. Well, I subscribe to it in the regular kind of case. I do not think the courts ought to thrust themselves into legislative and Presidential business and be deciding it. . . . (Comm. Print Draft, Vol. 1, at 548.)

Judge Bork's repudiation of congressional standing contrasts arkedly with Justice Powell's views. *In Goldwater v. Carter,* 444 .S. 996 (1979), Justice Powell rejected the notion that it is never ppropriate for the judicial branch to adjudicate constitutional disutes between the President and the Congress:

> Interpretation of the Constitution does not imply lack of respect for a coordinate branch. If the President and the Congress had reached irreconcilable positions, final disposition of the question presented . . . would eliminate, rather than create, multiple constitutional interpretations. The specter of the federal government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty 'to say what the law is.' (*Id.* at 1001, *quoting United States v. Nixon,* 418 U.S. 683, 703

(1974), *quoting Marbury v. Madison*, 1 Cranch 137, 177 (1803).)

Many significant laws adopted by Congress operate to restrict presidential power, without directly affecting the interests of persons likely to venture into court when the President ignores the law. Statutory limits on arms sales to foreign countries are one example. If the President unconstitutionally seeks to pocket veto such a limitation, no private party is likely to be adversely affected in a manner likely to lead to adjudication of the question by a federal court. If the Congress lacks standing to challenge such an unconstitutional pocket veto, the President would be free to ignore a duly enacted statute with impunity, subject only to the ultimate sanction of impeachment. As Senator Kennedy stated: "[C]ongressional standing may not always be appropriate, but it clearly is appropriate when the President unconstitutionally claims a duly enacted law is not a law at all." (Comm. Print Draft, Vol. 1, at 318.)

Reasonable people may differ about the circumstances under which it is appropriate for the federal courts to entertain lawsuits brought by Members of Congress—or the institution itself—to vindicate Congress's constitutional prerogatives. The committee finds alarming, however, Judge Bork's categorical rejection of congressional standing in all instances. As Justice Powell recognized, when Congress and the President reach irreconcilable positions regarding a matter of constitutional law, resolution of that conflict by the courts is fully consistent with the constitutional responsibility of the judicial branch "to say what the law is."

E. Judge Bork's Views on Executive Privilege Are Entirely Consistent with and Analogous to His Position on Congressional Standing

In a dissenting opinion in *Wolfe v. Department HHS*, 815 F.2d 1527 (D.C. Cir. 1987) (a case brought under the Freedom of Information Act seeking access to materials relating to proposed FDA regulations), the nominee "takes executive privilege as far as, and probably further than, any judge who has yet addressed the issue." (Sunstein statement, Comm. Print Draft, Vol. 3, at 1338.) He argued that in light of the imperatives of the modern administrative state, executive privilege should not be restricted to the President himself. Under this sweeping analysis, any government official acting in the performance of duties delegated to him by the President would be immune from divulging to Congress, the courts or the public communications generated in the course of such activities. Thus, Judge Bork would apparently further isolate the President and the entire executive branch from accountability to the other co-equal branches of government.

* * * * * * *

The committee believes that Judge Bork's views on the scope of presidential authority are troubling, not merely because those views would impose unprecedented limitations on Congress's ability to curb abuses of presidential power, but because his views in this area are the antithesis of judicial restraint. In the area of executive power, Judge Bork shows little deference to duly enacted legislation and little regard for either the text of the Constitution itself or

for the principle of checks and balances that resonates throughout the document.

VI. WATERGATE

A. Judge Bork's Actions During and After the Saturday Night Massacre Remain Controversial

The events surrounding the Saturday Night Massacre—the firing of Watergate Special Prosecutor Archibald Cox and the "firestorm" of public and congressional protests it generated—represent a pivotal moment in American history. Public outrage over such a blatant abuse of presidential power to shield criminal wrongdoing from justice led directly to impeachment proceedings in the House Judiciary Committee against President Richard M. Nixon. Those proceedings, and the public demand for the reestablishment of the Office of Watergate Special Prosecutor, triggered a chain of events that led inexorably to the historic resignation of President Nixon less than 10 months later.

In order to understand fully the events at issue, it is necessary to review briefly the context in which the firing of Archibald Cox occurred.

The concept of a Watergate Special Prosecutor achieved widespread public acceptance in May 1973, following the resignation on April 30, 1973, of top presidential aides H.R. Haldeman, John Ehrlichman and John Dean, and of Attorney General Richard Kleindienst. These resignations triggered the introduction of numerous resolutions in Congress calling for the appointment of an independent special prosecutor to investigate the entire Watergate matter. When Elliot Richardson was nominated to be the new Attorney General, he immediately pledged to appoint a special prosecutor. During Richardson's confirmation hearings, members of this committee—and other Senators—engaged in extensive discussions with Attorney General-designate Richardson concerning the charter for the special prosecutor's office. The charter provided that the special prosecutor could not be dismissed except for "extraordinary improprieties," and that the special prosecutor would "carry out his responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself." (28 C.F.R. Section 0.37, Subpart G–1 (May 31, 1973).) It was not until the committee agreed to the text of that charter, and until Mr. Richardson had agreed to publish the charter as a department regulation in the *Federal Register* to give it the force of law, that the committee proceeded to recommend his confirmation to the Senate.

The events leading to the confrontation between President Nixon and the special prosecutor's office were eloquently described by former Assistant Watergate Special Prosecutor George T. Frampton, Jr.:

> In June 1973, John Dean testified under immunity in televised Senate hearings that President Nixon participated in a Watergate cover-up. The President and every one of his close aides . . . all disputed Dean's version of events. In

> July 1973, the existence of the White House taping system was revealed. H.R. Haldeman testified that he personally had listened to some of the key Dean-Nixon conversations. The tapes themselves, Haldeman claimed, showed that the President, not Dean, was telling the truth about those meetings. By October, resolution of this conflict in testimony was the critical factor in completing the Watergate investigation. . . . Obtaining the Nixon tapes was a prerequisite to any successful prosecution of high-ranking White House aides. (Committee Print Draft, Vol. 3, at 1720.)

The special prosecutor's office obtained a court order requiring the President to turn over certain key tapes. In October 1973, that order was affirmed by the entire United States Court of Appeals for the District of Columbia Circuit. President Nixon's lawyers then proposed a "compromise" under which transcripts of the tapes would be turned over to the special prosecutor after being checked by a Member of the Senate. When Archibald Cox insisted on enforcement of the court order requiring production of the tapes, on October 20, 1973, President Nixon ordered his dismissal.

Attorney General Richardson and Deputy Attorney General William Ruckelshaus both resigned rather than follow the order. The task then fell to then-Solicitor General Robert Bork, who fired Mr. Cox on October 20, 1973.

On October 23, Judge Bork abolished the Office of Watergate Special Prosecutor and transferred the investigation to the Criminal Division of the Department of Justice under the direction of Assistant Attorney General Henry Petersen (and, through Petersen, then-Acting Attorney General Bork). In response to intense public and congressional demand for an independent investigation of the Watergate cover-up, President Nixon announced on Friday, October 26, 1973, that a new special prosecutor would be appointed.

The areas of concern for members of the committee regarding Judge Bork's actions include: (1) the legality of Judge Bork's firing of Archibald Cox; (2) Judge Bork's actions following the firing insofar as they may call into question his commitment to an independent, effective investigation of the White House cover-up; and (3) Judge Bork's views of executive power, in light of his actions at a moment of national crisis. In evaluating these areas of concern, the committee has considered the nominee's positions and representations in his private discussions at the time, and the inconsistencies in different participants' recollections about those positions and representations.

B. Judge Bork's Discharge of Special Prosecutor Archibald Cox Violated an Existing Justice Department Regulation Which had the Force and Effect of Law

Judge Bork and his supporters have defended the legality of his firing of Watergate Special Prosecutor Archibald Cox by making two distinct and not entirely consistent arguments. First, former Attorney General Richardson and Judge Bork have argued that the Justice Department regulations governing the Office of Watergate Special Prosecutor were simply Mr. Richardson's "personal commitment to this Committee . . . that . . . should [not] be regarded

as binding on the Justice Department generally or on anyone who might succeed me as Attorney General." (Written Statement of Elliot L. Richardson, Comm. Print Draft, Vol. 3 at 1651.) Second, Judge Bork has argued "that the President has a right to discharge any member of the Executive Branch he chooses to discharge." (Press Conference of October 24, 1973, at 4.)

There is and has always been one insuperable problem with the first argument—that the charter was merely a personal commitment of Mr. Richardson. The regulation at issue simply does not read and has not been interpreted that way. Judge Gerhard Gesell decided in *Nader* v. *Bork,* 366 F. Supp. 104 (D.D.C. 1973), *vacated,* No. 74-1620 (D.C. Cir. Aug 20 and Oct. 22, 1975), that the firing of Mr. Cox was indeed illegal, principally because the discharge "was in clear violation of an existing Justice Department regulation having the force of law." (366 F. Supp. at 108.) The regulation specified that the Watergate Special Prosecutor could be fired only for "extraordinary improprieties," and that he would otherwise "carry out [his] responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself." (28 C.F.R. Section 0.37, Subpart G-1 (May 31, 1973).)

Furthermore, as Senator Kennedy pointed out, during Attorney General-designate Richardson's confirmation hearings in 1973, Mr. Richardson had agreed to publish the special prosecutor's charter in the *Federal Register* so that the charter would have the force of law:

> As a member of this committee, I remember very clearly. I was very much involved . . . I think it [is] beyond imagination that the members of this committee were thinking that [the charter] was just established for Mr. Richardson and not [for the Department.] . . . I think it is very clear . . . from the record and the history and what this country was faced with [at that time], that [the charter] was not a personal contract with Mr. Richardson, but . . . with the office [of the Attorney General] itself. (Comm. Print Draft, Vol. 3, at 1660.)

While the *Nader* decision was subsequently vacated as moot because Mr. Cox did not seek reinstatement after a new special prosecutor was appointed, its basic holding—that the special prosecutor's charter was legally binding—was emphatically reaffirmed by the Supreme Court in the landmark case of *U.S.* v. *Nixon,* 418 U.S. 683 (1974): "So long as this [special prosecutor] regulation is extant, it has the force of law . . . [and] the Executive branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." (*Id.* at 695, 696.)

The second argument made in defense of Mr. Cox's firing is that the President has the authority to fire any member of the Executive Branch. In testimony before this committee, Judge Bork stated to the same effect that this presidential right is properly exercised "where a department head issues a regulation and the President . . . gives an order to abolish that regulation, which is, **in effect,**

what happened." (Comm. Print Draft, Vol. 1, at 168; emphasis added.) There are several problems with this argument.

One difficulty is that the claim that the President can "abolish" a regulation is at odds with the assertion that there was no regulation—only a personal "commitment"—to abolish. Another difficulty is that it does not accord with the record of events. The regulation was not in fact rescinded until October 23, three days after the firing of Mr. Cox.[9] Moreover, the regulation was rescinded by Judge Bork without any express order from President Nixon instructing him to do so—and the recission was deemed "arbitrary and unreasonable" by the District Court in Nader. (366 F. Supp. at 109.)

Still another difficulty is with Judge Bork's assumption that a peremptory recission pursuant to such a presidential order would, in fact, be legal, a position unsupported by case law. The assumption that such broad executive power existed and could properly be exercised for President Nixon's particular purposes at that time indicates a disturbingly expansive view of executive power. (*See generally* Part Three, Section V, *supra.*)

C. The Evidence and Testimony on Certain Factual Questions Are Contradictory. But at a Minimum They Establish that Judge Bork's Actions Immediately Following the Saturday Night Massacre Reveal a Misunderstanding of the Separation of Powers

On at least two key questions, Judge Bork has not always given a consistent description of his actions in the days immediately following the Saturday Night Massacre. The first issue concerns pursuit of the tapes.

In his 1982 confirmation hearings, Judge Bork testified that he spoke to Mr. Cox's deputies, Henry Ruth and Philip Lacovara, at a meeting on Sunday, October 21, 1973, which was also attended by Assistant Attorney General Petersen,

> telling them that they would have complete independence, and that I would guard that independence, **including their right to go to court to get the White House tapes or any other evidence they wanted . . .** to do precisely what they had been doing under Mr. Cox. (1982 Confirmation Hearings at 9; emphasis added).

That account is contradicted by Henry Ruth's testimony. Mr. Ruth stated that the Watergate Prosecution Force staff did not receive assurances from Judge Bork at that meeting that they could continue to seek the White House tapes:

> No one in that room had any power, in my opinion, to do anything. Mr. Bork was entirely irrelevant. The show was

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[9] In his 1982 confirmation hearings, Judge Bork sought to belittle the significance of this fact, stating: "I do not think that issue of which order it should have come in and whether the thing was illegal for 36 hours is important." (Testimony of Robert H. Bork, "Confirmation of Federal Judges," *Hearings Before the Senate Committee on the Judiciary*, 97th Cong., 2nd Sess., Part 3 at 9.) The committee strongly believes, however, that the question of whether Judge Bork acted according to law when he fired Mr. Cox is fundamentally important. Strict adherence to the rule of law can never be more important than during a time of grave constitutional confrontation.

> being run by the White House. . . . No one in that room knew what was going to happen the next time we subpoenaed a tape and the court upheld it and the President said no. Mr. Bork never told us his position on that issue. (Comm. Print Draft, Vol. 3, at 1728.)

Judge Bork did acknowledge in his recent testimony before the committee that neither of the deputies remembered any mention of tapes at that meeting, but that "the common recollection . . . [was] I said that they were to go forward as before. . . ." (Comm. Print Draft, Vol. 1 at 122.) The most that Mr. Lacovara said, in a statement submitted to the committee on behalf of Judge Bork, was that the nominee "expected a full and a thorough investigation of all matters under our jurisdiction." (Written Statement of Philip A. Lacovara, Comm. Print Draft, Vol. 3, at 1744.) This was, of course, simply a restatement of President Nixon's authorization to Judge Bork on October 20.

The more recent recollections of those involved are particularly significant because of the light they shed on Judge Bork's characterization of the mission of the special prosecutor's staff after the Saturday Night Massacre. To expect that the staff could in fact continue "to do precisely what they had been doing under Mr. Cox" was, in the view of the committee, most unrealistic. "What they had been doing under Mr. Cox" was to pursue the tapes so vigorously that President Nixon had Mr. Cox fired for it. It is understandable that Mr. Cox's staff was somewhat skeptical of assurances of access to the tapes and of "vigorous" prosecutions from an official who had been the instrument of that firing.

Second, a question exists about exactly when Judge Bork began to search for a new special prosecutor. The history of the Watergate investigation makes clear that a complete investigation was allowed to proceed only because the President was forced to acquiesce in the appointment of a new special prosecutor within a week after Mr. Cox's discharge.

Judge Bork and his supporters have contended that he began the search for a new special prosecutor immediately after Mr. Cox was fired so that a complete investigation could continue. But according to Judge Bork's own statement at the time, the regulation was rescinded—*three days after the firing*—because "the matter was to be held and handled within the Criminal Division under my over-all authority . . . and that charter [the Special Prosecutor regulation] was inappropriate at that time. ("White House Press Conference of Acting Attorney General Robert H. Bork on the Appointment of Leon Jaworski as Watergate Special Prosecutor," November 1, 1973, at 3.) And when he was nominated to the Court of Appeals in 1982, Judge Bork told William T. Coleman, Jr., the American Bar Association's reviewer, that "immediately after firing Mr. Cox, I set out to find a new Watergate Special Prosecutor." (*See* Committee insert at 974.)

Returning to his 1973 position, Judge Bork told the committee during these hearings that the decision to appoint a new special prosecutor was not made until several days after the Cox firing, when the White House was forced to accede to political pressure:

> Senator METZENBAUM. But you had no guarantee from President Nixon at the time he fired Mr. Cox that there would even be another special prosecutor. Is it not a fact that the decision to appoint a new special prosecutor was not made until several days after the President had provided a firestorm of controversy around the country?
>
> Judge BORK. That is right. Initially, we intended to leave the Special Prosecution Force intact but not to appoint a new special prosecutor, and they would go on under Mr. Ruth and Mr. Lacovara as before. But we did not initially contemplate a new special prosecutor until we saw that it was necessary because the American people would not be mollified without one. (Comm. Print Draft, Vol. 1., at 206.)

While this latter testimony seems more consistent with the public record, Judge Bork's 1982 remarks to Secretary Coleman, as well as the testimony delivered recently on Judge Bork's behalf, suggested that he was energetically seeking a new special prosecutor by "Monday . . . just a few hours after the Saturday Night Massacre. . . ." (Testimony of Professor Dallin Oaks, Comm. Print Draft, Vol. 3, at 1503.) In response to a question by Senator Kennedy, Mr. Ruth indicated that he believed to be accurate Judge Bork's statement that he did not set out to find a new special prosecutor until the American people indicated that they would not be mollified without one. Referring to Judge Bork's actions at the time, Mr. Ruth commented:

> We never thought that Mr. Bork was in favor of a new Special Prosecutor, and the only reason we were staying as a unit was because we thought the Republican congressional reaction was going to force Mr. Nixon to appoint a new special prosecutor. (Comm. Print Draft, Vol. 3, at 1729.)

At least through October 23, therefore, there could hardly have been a serious intention to appoint a new Special Prosecutor who, realistically, would be independent enough to go after the tapes—regardless of what Judge Bork's personal expectations were about access to the tapes. Moreover, as the suggestion that the search began on Monday is also inconsistent with Judge Bork's recent testimony, the committee concludes that the discrepancy is most likely one of understandably different recollections of timing regarding events of 14 years ago. The nominee probably did vigorously seek a new special prosecutor by the end of that week (of October 21–26, 1973), once "politically, he realized he had to have a special prosecutor." (Testimony of Henry Ruth, Comm. Print Draft, Vol. 3, at 1759.)

* * * * * * *

In the committee's view, perhaps the most significant aspect regarding the firing of the Watergate Special Prosecutor is Judge Bork's immediate and continuing perception that an effective Watergate investigation could be run out of the same Department of Justice that had just carried out the task of firing Mr. Cox for seeking to run such an investigation. The degree of deference to executive authority and executive representations required to hold that

perception is astonishing in the face of the abuses of executive authority represented by President Nixon's actions at the time.

Institutionalized checks on unrestrained power constitute the very life of our Constitution and are an indispensable ingredient of our freedom. The great deference to executive power shown by the nominee in the actions related here, as well as in many of his other statements and judicial opinions, (*see generally* Part III, Section V, *supra*), seems inappropriate for a member of the Supreme Court, which is responsible for preserving the constitutional system of checks and balances.

VII. ANTITRUST

Judge Bork has called antitrust "a particularly instructive microcosm" of his over-all judicial, social and political philosophy. Despite his reputation as a practitioner of judicial restraint, he is, in the words of Robert Pitofsky, a respected antitrust scholar and Dean of the Georgetown University Law Center, "an activist of the right" in the antitrust field, "ready and willing to substitute his views for legislative history and precedent in order to achieve his ideological goals; and . . . even when examined by comparison to other conservative critics of antitrust enforcement, his views are extreme." (Comm. Print Draft. Vol. 3, at 2000.) Judge Bork's appointment to the Supreme Court is likely to result in "antitrust changes of truly tidal proportions" that, in the words of the editor of the *Antitrust Law and Economics Review* (a professional journal for antitrust economists), "are likely to do great damage to the country's domestic and thus its international competitiveness well into the 21st century." (Letter to Hon. Edward Kennedy, August 3, 1987.)

. Judge Bork's Antitrust Theory Was Well Established Prior to the Hearings

1. Judge Bork's Basic Theory Ignores Congressional Intent by Contending that "Efficiency" Is the Only Goal of the Antitrust Laws

Judge Bork made his early reputation as an antitrust scholar. He first attracted attention in the 1960s with several important articles arguing that there was too much antitrust enforcement. (*See, e.g.*, "The Crisis in Antitrust," *Fortune*, December, 1963.) He expanded his analysis into an influential book, *The Antitrust Paradox*, published in 1978, and he has continued to write and lecture on the subject while serving on the D.C. Circuit Court of Appeals. While Judge Bork has, over the past few years, tried to distance himself from earlier views in several other areas of the law, he still is closely associated with his long-held views on antitrust.

The central premise of Judge Bork's antitrust philosophy is that in enacting the federal antitrust laws, Congress sought to promote only one purpose—industrial or "allocation" efficiency, which he has labeled "consumer welfare." In fact, he has repeatedly called the promotion of economic efficiency the only legitimate goal of antitrust.

"Consumer welfare" is a technical economic concept that relates to efficiency in an economy-wide sense. As used by Judge Bork, it

really has little to do with the more commonly understood definition—that is, the unfair acquisition of consumers' wealth by firms with market power. Higher prices to consumers are not troublesome to Judge Bork as long as the monopolistic business produces efficiently.

Pivotal to Judge Bork's analysis is his view of the legislative history of the Sherman Act and the other basic antitrust statutes, such as the Clayton Act and the Federal Trade Commission Act. Judge Bork has asserted that there is "not a scintilla of support" in the legislative history of the Sherman Act for "broad social, political and ethical mandates." ("Legislative Intent and the Policy of the Sherman Act," 9 *J. L. & Econ.* 7, 10 (1966).) Rather, he says that the original drafters had a single intent—to enhance economic efficiency.

A number of recognized antitrust scholars, however, have taken exception to this limited reading of the "original intent" of the antitrust statutes. They argue that Congress was equally concerned about the concentration of economic and political power; with the unfair exploitation of consumers by firms with monopoly power; and to a lesser but still significant extent, with the preservation of small business and the threat of direct government regulation which monopoly power posed. (*See* Pitofsky testimony, Comm. Print Draft, Vol. 3 at 2001–08; Pitofsky, "The Political Content of Antitrust," 127 *U. Pa. L. Rev.* 1051–75 (1979); Lande, "Wealth Transfers as the Original Primary Concern of Antitrust: The Efficiency Interpretation Challenged," 34 *Hastings L. J.* 65–151 (1982).)

2. Judge Bork's Antitrust Policies Are at Sharp Odds with Current Law

If Judge Bork's vision of antitrust prevailed, consumers would have substantially fewer protections under the antitrust laws than is the case under current law. In his view, only three classes of business conduct should be illegal: (1) horizontal agreements to fix prices or divide markets, **but only** when these restraints are not a legitimate aid to some other activity that promotes efficiency; (2) horizontal mergers that leave less than three significant rivals in a market; and (3) monopolistic practices to drive out rivals or raise barriers to entry.

Horizontal Mergers: These are mergers between direct competitors in the same market. Judge Bork's views on horizontal mergers are among his most controversial and extreme. To Judge Bork, the rewards of efficiency resulting from horizontal combinations are so great that there should be no legal obstacle to horizontal mergers unless they result in fewer than three significant firms holding 60 to 70 percent of the market. Judge Bork relies on market share as the only test of whether a merger should be allowed to go forward, in contravention to long-standing Supreme Court precedent. (*See, e.g., Brown Shoe* v. *U.S.*, 370 U.S. 294 (1962).)

Vertical and Conglomerate Mergers: These are mergers between persons at different levels of the distribution chain (such as manufacturer and retailer) or between companies in unrelated businesses. Judge Bork argues that vertical mergers enhance efficiency and are harmless to competition because they merely internalize transactions that would otherwise occur in the market. Judge Bork be-

lieves that "antitrust should never interfere with any conglomerate merger" (*The Antitrust Paradox* at 248) as there can be no harmful effect on competition.

Resale Price Fixing: Judge Bork believes that all vertical restraints, including resale price fixing, should be "completely lawful." (*Antitrust Paradox* at 288.) He contends that the Supreme Court erroneously concluded in 1911 that vertical price fixing should be *per se* illegal and that the mistake has been compounded ever since. He maintains that many efficiencies result from resale price fixing, including the inducement to dealers to provide additional services such as demonstrations or repairs. In this area, Judge Bork's views are directly contrary to expressed congressional policy, including legislation to outlaw state fair trade laws and recent amendments to various appropriations bills that have prohibited the Justice Department from filing *amicus curiae* briefs in support of the argument that resale price fixing should be legal *per se*.

3. The Hearing Testimony Reflected Serious Concern About Judge Bork's Antitrust Views

In testimony before the committee, New York State Attorney General Robert Abrams aptly summed up the potential impact of Judge Bork's antitrust views:

> If confirmed, Judge Bork seems likely to attempt to swing the Supreme Court to the following specific antitrust positions, beyond his primary goal to make all antitrust cases an inquiry into efficiency considerations using market share data as the primary evidentiary tool.
>
> 1. All vertical price-fixing and all non-price vertical restraints of trade would be lawful.
>
> 2. All conglomerate and vertical mergers would be lawful.
>
> 3. All horizontal mergers would be permitted up to and including the point at which an industry was left with only three substantial firms, one of which could attain 40% market share. This equates to a permissible HHI [Herfindahl Index] concentration ratio of roughly 3400, whereas both the Justice Department and the State Attorneys General Merger Guidelines now consider HHI of 1800 to be the threshold of high concentration and likely antitrust intervention.
>
> 4. All tying arrangments and exclusive dealing arrangements would be lawful.
>
> 5. Claims of predatory pricing and price discrimination would no longer be actionable.
>
> 6. Horizontal price fixing and market allocation would be lawful if engaged in by sellers with roughly 40% or less market share, who were engaged in some other legitimate form of integration, such as joint advertising. (Comm. Print Draft, Vol. 3, at 1978–79; footnotes omitted.)

The practical effect of these legal policies would have serious consequences for the American economy and the American consumer. Applying Judge Bork's rule on mergers would permit very

large consolidations of economic power in this country. For example, it could permit a merger between Texaco and Exxon in the oil industry, or the takeover of Coca-Cola by Seven-Up. Taking international competition into account, Ford might be able to merge with Chrysler. Based on his view that the antitrust laws should not be applied to conglomerate mergers, Judge Bork would not prevent a handful of "mega-corporations" from developing. (*See* Pitofsky testimony, Comm. Print Draft, Vol. 3, at 1998.)

Finally, Judge Bork's view that vertical price fixing should be legal would be especially harmful to consumers. As elicited in questioning by Senator Metzenbaum, many discount retailers would be put out of business, forcing consumers to pay higher prices dictated by manufacturers:

> Senator METZENBAUM. You [Judge Bork] believe that the rule that we have had in this country since 1911 which prohibits manufacturers from fixing the retail price of their products should be overturned. You have written, and I quote, that "it should be completely lawful"—that is your phrase, "completely lawful"—"for a manufacturer to fix retail prices."
>
> In other words, if somebody like K-Mart or Toys "R" Us or some discounter is selling children's shoes at $25 and the manufacturer wants them sold at $50, under your theory it would be entirely lawful for the manufacturer to require the retailer to charge the higher price. Now, that is price fixing, pure and simple, and it has been illegal since 1911. . . .
>
> Tell me in language that you and I can understand, and the American people can understand, how you can argue that price fixing is going to help the consumer?
>
> Judge BORK. The manufacturer who is fixing the price of the dealers has no reason in this world to want to give them a fatter profit. What he wants them to do, usually, is to compete in a different way; compete by providing information, compete by providing selling services, compete by adding things to the product.
>
> Now, those are not bad activities and if he could own those dealers himself, or if he owned them himself, he would probably sell at the price he fixed and add those services. It is merely a way of doing by contract what he could do if he owned them, and the purpose is to get these people to compete in other ways and not below a certain price.
>
> Senator METZENBAUM. As a matter of fact, I have a pretty good ally on this particular issue, and that is, President Reagan spoke out against fair trade laws, saying they hurt consumers by keeping prices up. Do you think the President was wrong?
>
> Judge BORK. I do not think the President—the President may be right or wrong, but I do not think he has engaged in this analysis of the economics of the situation. . . . (Comm. Print Draft, Vol. 1, at 339–341.)

The concern over Judge Bork's antitrust views was articulated by the Attorney General of West Virginia, Charles G. Brown:

> We would see the institutionalization of non-enforcement on the Federal level and the gradual erosion of this enforcement by the States. The real victims of a Bork antitrust era on the Supreme Court will be consumers, small business entrepreneurs, and mid-sized corporations. For the individual buyer and the bold business person, there will be nothing free about the market created by Judge Bork. Price-fixing and exclusive dealing will rule the marketplace. Innovative industrialists will be absorbed in the great corporate giants. (Brown testimony, Comm. Print Draft, Vol. 3, at 1981.)

B. Judge Bork Has Shown Little Respect for Supreme Court Precedent in the Field of Antitrust

Judge Bork has criticized most of the landmark antitrust Supreme Court decisions, including *Brown Shoe* v. *United States*, 370 U.S. 294 (1962) (horizontal and vertical mergers); *FTC* v. *Procter & Gamble*, 386 U.S. 568 (1967) (conglomerate mergers); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911) (per se illegality of resale price maintenance); and *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949) (illegality of exclusive dealing arrangements). In fact, he has called the entire body of Supreme Court precedent in the antitrust field "mindless law." (*The Antitrust Paradox* at 411.)

Judge Bork has said that the Supreme Court occupies a unique place in this country's judicial system because it is not bound by the precedent of any court. Given that Judge Bork holds most of the Supreme Court's antitrust work in very low esteem, there is a substantial risk that he would utilize a position on the Court to rectify what he sees as the errors the Court has made by its failure to understand economic principles and the original intent of the antitrust statutes. If his writings are a fair guide, he could vote to overrule a substantial proportion of precedent in this field. (*See* Pitofsky Testimony, Comm. Print Draft, Vol. 3, at 1999.)

Judge Bork has written only one significant antitrust opinion while serving on the D.C. Circuit (*Rothery* v. *Atlas Van Lines*, 792 F. 2d. 210 (1986)), but that case clearly demonstrates that he will not hesitate to put his activist views into practice. *Rothery* was a simple case involving competitive restraints placed on a local agent by a national van line; neither party held a significant share of the market. Judge Bork reached out, however, to declare that two important Supreme Court cases on horizontal restraints had been effectively overruled, even though the Court itself has not taken such action, explicitly or implicitly. (*See* Pitofsky statement, Comm. Print Draft, Vol. 3, at 2009–2011.) He also pronounced that market power was the sole criteria for measuring the legitimacy of trade practices, and that it was unnecessary to engage in a more searching analysis of the positive and negative competitive effects of a particular business practice. In a concurring opinion, Chief Judge Wald sharply criticized Judge Bork's opinion.

The *Rothery* case demonstrates Judge Bork's adeptness at circumventing precedent to propel his reasoning to a desired conclusion. Responding to a question by Senator Specter suggesting that Judge Bork might "just be making a point in academic style as opposed to really setting down a final thought," Attorney General Brown of West Virginia pointed out the special significance of the *Rothery* case:

> Senator Specter, I believe that he wants to bring the thoughts of *The Antitrust Paradox* right into his judicial work because he had done that. In *Rothery*, he took what was perceived as a rule of reason case, probably a vertical restraint case, made it a horizontal case in order to write his whole theory of horizontal boycotts and horizontal restraints of trade. . . . So I think that his ideas between the time he wrote the book and the time he got on the Court remained the same, and I think he has made every effort to bring those ideas right into the court work. . . . (Comm. Print Draft, Vol. 3, at 2086–87.)

C. Judge Bork's Willingness to Ignore the Will of Congress in the Antitrust Area Sharply Conflicts with His Professed Deference to the Will of the Majority.

In the antitrust arena, Judge Bork has called for unprecedented judicial activism, proposing that the courts ignore almost 100 years of judicial precedents and congressional enactments. His views are particularly relevant to his constitutional jurisprudence because he has analogized the basic antitrust statutes to the Constitution: "[T]he antitrust laws are so open-textured, leave so much to be filled in by the judiciary, that the Court plays in antitrust almost as unconstrained a role as it does in constitutional law." (*The Antitrust Paradox* at 409.) Judge Bork uses the failure of the courts and the Congress to consider or understand economics to reject as "mindless law" cases and statutes that expand application of the antitrust laws beyond the narrow range of practices that he believes should be prohibited. His undisguised distrust of and disregard for congressional enactments cannot be reconciled with his professed philosophy of judicial deference to the will of Congress. This inconsistency is what Chairman Biden labeled "the Bork paradox." (Comm. Print Draft, Vol. 3, at 2065.)

In response to questioning during these hearings, Judge Bork did state that he would go along with the will of Congress in the antitrust field, even if he thought Congress's judgment was mistaken. Responding to a question posed by Senator Specter, Judge Bork said: "I am out there to follow Congress's intentions. . . . [I]f Congress says '[t]his thing threatens competition; strike it down,' I have to do that even if I do not think it threatens competition." (Comm. Print Draft, Vol. 1, at 690–91.) This current position represents a dramatic change, however, from Judge Bork's prior statements:

> Courts that know better ought not to accept delegations to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary. . . . It would have been best, therefore, if the courts first confronted with the Clayton

> Act and later the Robinson-Patman Act had said something along these lines: We can discern no way in which tying arrangements, exclusive dealing contracts, vertical mergers, price differences and the like injure competition or lead to monopoly. . . . For these reasons, and since the statutes in question leave the ultimate economic judgment to us, we hold that, with the sole exception of horizontal mergers, the practices mentioned in the statutes never injure competition and hence are not illegal under the laws as written. (*The Antitrust Paradox* at 410.)

In the antitrust field, Judge Bork interprets congressional will selectively to suit his own agenda. He not only considers his interpretation of the original intent of the antitrust laws to be the only "correct" one, but he also denounces as unconstitutionally vague any conclusions to the contrary.

* * * * * * *

Dean Pitofsky gave a chilling summary of the impact of Judge Bork's "vision of antitrust:"

> As a result, it is likely that this would be a very different country. Large firms could behave far more aggressively against rivals without fear of monopolization charges, each industry could become concentrated by merger to the point where only two or three firms remained, and wholesalers and retailers would be under the thumb of the suppliers as to where and at what price they can sell and what brands they can carry. Firms might continue to display vigorous competitive characteristics, but that would only be as a result of market forces. The antitrust laws would be available as a check should market forces fail to work properly. (Pitofsky statement, Comm. Print Draft, Vol. 3, at 2011.)

The impact of Judge Bork's views on antitrust laws was also well described in an exchange between Senator Kennedy, New York Attorney General Robert Abrams and West Virginia Attorney General Charles Brown:

> Senator KENNEDY. I think the people in our country want to know how this nomination is going to affect the quality of their lives, and from what I know in terms of [Judge Bork's] antitrust positions it will have an important impact on . . . average citizens and their ability to purchase various goods. . . . Why should the consumers in the States that you represent be concerned about this judge, should his view[s] . . . on antitrust law become the law of the land?
>
> Mr. ABRAMS. Judge Bork, if his views were to be adopted . . . would virtually eliminate 90-95 percent of the antitrust laws, and the kinds of protections that consumers have known for the better part of a century . . . [E]very day in the marketplace, there are situations where money is taken from the wallets of consumers because of predatory practices, anti-competitive practices, and if Judge Bork's agenda, which is long, was ever

> implemented, these consumers would have no protection. . . .
>
> Mr. Brown. It would be a disastrous impact, Senator Kennedy. I am glad you asked. The antitrust laws really benefit all of us. They benefit consumers in the way of lower prices. They benefit taxpayers. . . . They benefit business, bold entrepreneurs, people that want to compete, take chances. Those are the businesses that really benefit when you enforce the antitrust laws. This non-enforcement would have a terrible effect. (Comm. Print Draft, Vol. 3, at 2069–70.)

Judge Bork's antitrust views, together with the "Bork Paradox"—the willingness of Judge Bork to engage in judicial activism despite his supposed adherence to a philosophy of judicial restraint—are yet further reasons why the committee concludes that his nomination to the Supreme Court should be rejected.

VIII. JUDGE BORK'S ACTIONS IN VANDER JAGT V. O'NEILL

Judge Bork's conduct in connection with his participation as a judge in the case of *Vander Jagt* v. *O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983), raises questions concerning his judicial demeanor and attitude toward his colleagues on the bench. In *Vander Jagt*, 14 Republican Congressmen filed suit protesting their underrepresentation on certain House committees and alleging that they were being deprived of equal voting rights. The district court dismissed their complaint, and on appeal to the United States Court of Appeals for the District of Columbia Circuit, the case was assigned to a panel consisting of Judge Roger Robb, Judge Bork and Judge James Gordon, a senior United States District Judge from the Western District of Kentucky who was sitting by designation.

At the conference following the March 19, 1982 oral argument in *Vander Jagt*, the panel unanimously agreed to find against the Republican Congressmen. Judges Robb and Gordon believed the case was governed by the remedial discretion doctrine previously articulated by Judge Robb in *Riegle* v. *Federal Open Market Committee*, 556 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). Under *Riegle*, a court can exercise its discretionary power to deny relief where separation of powers concerns dictate doing so; the court in that case had specifically rejected using lack of standing as a ground for denying relief. Judge Robb assigned the *Vander Jagt* opinion to Judge Bork, stating in his post-conference memorandum:

> At conference, we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons. (Memorandum to Judge Bork and Judge Gordon from Judge Robb, March 19, 1982.)

Judge Gordon, in correspondence with the Judiciary Committee, recalled that Judge Bork had mentioned the "lack of standing doctrine" at the end of the conference, but that Judges Robb and Gordon had vigorously opposed that approach. Judge Gordon con-

cluded from the conversation that "[t]here is no way Judge Bork could have misunderstood Robb's and my position." (Letter to The Honorable Joseph Biden from Judge James F. Gordon, August 24, 1987, at 2 [hereinafter "Letter to Senator Biden"].)

On September 17, 1982—six months after the case was argued—Judge Bork circulated his proposed majority opinion denying relief on the ground that the Congressmen lacked standing to bring their suit. Moreover, rather than relying on *Riegle*, as the panel had agreed, Judge Bork's draft apparently suggested that that case had been overruled. The draft was sent without any explanation and was accompanied by a cover memorandum stating only that "[a]ttached is my proposed opinion in the above-mentioned case for your review and comment." (Memorandum to Judge Robb and Judge Gordon from Judge Bork, September 17, 1982.)

Judges Robb and Gordon were taken by surprise by the approach of Judge Bork's draft. Judge Robb, who is now deceased, was hospitalized at the time with a broken hip. His law clerk, Joseph D. Lee, submitted an affidavit to the committee stating:

> Although I do not recall Judge Robb's words at this point, I had the firm impression that he was both surprised and angered by these events. It was clear to me that he had not expected the draft opinion to dispose of the case on standing grounds or to suggest that *Riegle* was no longer good law. (Aff. of Joseph D. Lee, Oct. 2, 1987, at para. 8 [hereinafter "Aff. of Lee"].)

Similarly, Judge Gordon noted that "[he] was shocked, to say the least, at the tenor of the opinion . . ." (Letter to Senator Biden at 2.) Judge Gordon attempted to reach Judge Robb to discuss the draft opinion and was told that Judge Robb was hospitalized at the time. Judge Gordon then asked his law clerk to check with Judge Robb's law clerk to see if Judge Robb had changed his mind about the case.

Within the next week, another judge on the D.C. Circuit contacted Judge Gordon on behalf of Judge Robb, and instructed Judge Gordon to prepare the majority opinion granting standing to the Congressmen but denying relief based on *Riegle*. Judge Robb subsequently wrote a memorandum to Judges Bork and Gordon setting forth his disagreement with Judge Bork's proposed disposition of the case and again suggesting that Judge Gordon draft the opinion. (Memorandum to Judge Bork and Judge Gordon from Judge Robb, October 5, 1982.)

Judge Bork was apparently aware that he should have discussed his proposed disposition with the other panel members before circulating his draft. On September 24, 1982, he sought to remedy this omission and wrote to Judge Gordon that "[i]t occurs to me too late that I should have notified you in advance that I had changed the rationale in the *Vander Jagt* case to one of lack of standing." (Letter to the Honorable James F. Gordon from Judge Robert H. Bork, September 24, 1982.) And on October 8, 1982, Judge Bork wrote to both Judge Robb and Judge Gordon, stating that "[Judge Bork's] earlier failure to communicate is largely responsible for the confusion into which this case has been plunged. . . ." (Memorandum to Judge Robb and Judge Gordon from Judge Bork, October 8,

1982, at 1 [hereinafter "Memorandum to Judge Robb and Judge Gordon"].) He explained:

> I think it easier to deal with this case on the standing doctrine than on the political question doctrine or the Speech or Debate Clause. That is true both for doctrinal reasons and because the latter two questions are much involved in a case we are to hear *en banc* later this month. (*Id.* at para. 1.)

(The *en banc* decision, *Murray* v. *Buchanan*, 720 F.2d 689 (D.C. Cir. 1983) (*en banc*), dealt with the standing of taxpayers to challenge the constitutionality of a statute, as opposed to the very different matter of congressional standing to challenge the apportionment of committee seats in Congress.)

Judge Bork also stated that he had discussed his lack-of-standing approach with Judge Robb, and that the latter had agreed to that approach. The evidence is conflicting on this point. Judge Bork testified that "Judge Robb's secretary remembers me coming in to have that conversation., my clerks remember me going up and coming back and saying that Judge Robb had agreed." (Comm. Print Draft, Vol. 1, at 106.) Judge Robb's law clerk, however, found nothing in Judge Robb's files indicating that there had been such a meeting. (Aff. of Lee at para. 10.) Furthermore, Judge Gordon "d[id] not believe Judge Robb changed his position." (Aff. of Judge James F. Gordon, Oct. 2, 1987, at para. 3.)

Indeed, in his October 8, 1982 memorandum, Judge Bork noted that "Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed." (Memorandum to Judge Robb and Judge Gordon at para. 2.) Again, Judge Robb's law clerk takes issue with the implications of this statement:

> During my clerkship with Judge Robb, he consistently impressed me as an extremely intelligent and thoughtful individual. I am unaware of any significant lapses of memory on his part before November 1982, when Judge Robb suffered a stroke. I think it very unlikely that had Judge Robb agreed in or after March 1982 to change the rationale of the *Vander Jagt* opinion to one of standing, he would have completely forgotten having done so by October 1982. (Aff. of Lee at para. 12.)

While Judge Bork may well have met with Judge Robb to discuss the case, it seems clear that Judge Robb, who was the author of *Riegle* and who so vehemently disagreed with Judge Bork's draft, did not agree to Judge Bork's rationale.

Because of the long delay in Judge Bork's handling of the case, the court's order was not filed until December 23, 1982, as Judge Gordon waited for Judge Bork to complete his concurring opinion. Thus, the disposition of the case was delayed until the waning days of the Congress, threatening to moot the case.

Judge Bork's actions in *Vander Jagt* raise serious concerns. Judge Bork testified that he drafted his proposed majority opinion as he did because he found that an opinion based on *Riegle* "will not write that way." (Comm. Print Draft, Vol. 1, at 106.) Judge

Gordon, of course, was able to write the opinion "that way." Furthermore, as Judge Shirley M. Hufstedler noted in a letter to the Committee:

> When a writing judge runs into that kind of snag, the ordinary course is to discuss the problem with one's colleagues in a personal meeting, a telephone conference, or in an explanatory memorandum, with or without an accompanying draft opinion. (Letter to Senator Edward Kennedy from Shirley M. Hufstedler, October 3, 1987, at 10 [hereinafter "Letter from Judge Hufstedler"].)

While Judge Bork met with Judge Robb, the latter apparently rejected the lack-of-standing rationale. And Judge Bork never communicated with Judge Gordon until the latter protested the proposed disposition of the case.

Judge Bork testified that the implication that he attempted to pass off his own views as the views of the panel was not possible. He explained that "there is a rule in our Circuit that when the other two judges have concurred in your draft, you circulate the draft to the full Court . . . and their clerks all read it." (Comm. Print Draft, Vol. 1, at 107.) This rule does not address, however, relations among the three judges on a panel prior to circulating a draft opinion.

But apart from questions of judicial etiquette, Judge Bork's conduct evidences a lack of consideration for the rights of the litigants. While it is true that judicial opinions can sometimes take many months to write, a new judge—as Judge Bork was at the time—has no backlog of unwritten opinions to prevent his turning his immediate attention to drafting opinions. Judge Hufstedler suggests that, even with the other work of the chambers, "the writing of an opinion in the case should not have consumed more than two weeks." (Letter from Judge Hufstedler at 6.) But Judge Bork waited six months to circulate his draft—a draft relying on arguments that had already been rejected by the other two members of the panel.

* * * * * * *

As Judge Hufstedler has said: "Judge Bork's determination to state his convictions on standing were more important to him than his duty as a judge to decide the case before him." (Letter from Judge Hufstedler at 8.) Judge Gordon drew the same inference. He stated that he "shall be forever convinced that there was a design and plan in Judge Bork's actions and activities." (Letter to Senator Biden at 5.) He explained that he had "grave reason to suspect that perhaps Judge Bork intended to have his narrow 'no standing' view become the majority opinion of the Court and the law of the Circuit when, in fact, it was the minority opinion." (*Id.*)

IX. JUDGE BORK'S ROLES AS SOLICITOR GENERAL AND AS A COURT OF APPEALS JUDGE

A. Solicitor General

Supporters of Judge Bork's confirmation have argued frequently that his record as Solicitor General supports the claim that he

favors minority and female rights. An examination of the nature of Judge Bork's role as Solicitor General does not, however, support this claim. Whatever might be said about the substance of Judge Bork's other positions on minority and women's rights, his own conception of the Solicitor General's office and his performance as head of it suggests that his tenure there is simply not of much relevance to an assessment of his likely performance on the Supreme Court.

1. Judge Bork's Own Statments and Positions Prior to the Hearings Demonstrate that He Took Positions as Solicitor General with Which He Personally Did Not Agree

Judge Bork's own statements in his confirmation hearings to be Solicitor General clearly outline his own concept of the position. When asked by the late Senator Phillip Hart if he would in fact be simply "the Government's appeal lawyer," Judge Bork responded: "That is quite accurate, Senator, yes." The colloquy continued:

> Senator HART. It is a policy post?
>
> Judge BORK. Not particularly, Senator. **I view it as a post of being the attorney for the Government.**
>
> Senator HART. What if the Government takes a position in the field of antitrust or civil rights that you think is wrong, and have said in the past is wrong, what do you do?
>
> Judge BORK. What will I do? **I will enforce the policy of the Government** in antitrust as the Government defines it. **I do not define it,** Senator. (Solicitor General Hearings at 8; emphasis added.)

Judge Bork reemphasized the close analogy of the attorney-client relationship to his new position when he was asked by Senator Tunney, "Do you think that you could sign a brief that was inconsistent with your personal views?" He responded, "I think I can, Senator, and I know I have." *(Solicitor General* Hearings, at 14.) The central obligation of the good attorney is to serve his client's interests, not to pursue his own policies. In this case, the interests of the client are the policies of the relevant Federal agencies.

Judge Bork's proponents have focused particularly on his amicus curiae briefs to the Supreme Court—where the government, as a friend of the court, files a brief because it thinks a position is right rather than because it is a party to the lawsuit. The committee finds, however, that Judge Bork's amicus briefs do not support the claims being made about his role as Solicitor General.

First, Judge Bork's responses to Senator Hart's questions in the above colloquy are virtually as applicable to amicus briefs as they are to briefs on behalf of the government as a party. While the Solicitor General may have somewhat more leeway as an amicus, he is still largely the "attorney for the Government" representing the general policies of that government. He is not appointed primarily to expound his own views, even in amicus briefs.

Second, Judge Bork's statements to Senator Tunney with respect to amicus briefs in the reapportionment area demonstrate that his own views were clearly of secondary significance to his performance as Solicitor General. When asked, "If you had been Solicitor

General, would you have been able to argue for 'one man, one vote?' ", Judge Bork answered:

> Would I have been able to? Yes, sir; I would have been able to. I would have advised against it. . . . [If the Attorney General insisted on an argument in favor,] I think I would say to the Attorney General at that time, "I will do so." I would also advise that we explain to the court . . . what some of the problems with that approach may be and what alternative approaches there might be. (Solicitor General Hearings at 13–14.)

Judge Bork was clearly aware from the start, therefore, of the institutional constraints on the expression of his own views as Solicitor General and was quite prepared to be the "attorney for the Government" when the government's position differed from his own.

One clear example of how Judge Bork subordinated his own position to that of the government is *Runyon* v. *McCrary,* 427 U.S. 160 (1976), a case frequently cited by Judge Bork's supporters as evidence of pro-civil rights predilections. Along with five other officials of the Justice Department, Solicitor General Bork filed an amicus brief in *Runyon,* in which the Supreme Court held that the Civil Rights Act of 1866 prohibited racially discriminatory admissions policies in private schools. Part of that Act prohibits racial discrimination in the making and enforcing of private contracts. The Court's ruling depended on a determination that the Enforcement Clause (Section 2) of the 13th Amendment made this part of the Act constitutional. (427 U.S. at 179.)

Then Solicitor General Bork's support for this case stands in stark contrast to the positions he took **both before and after** he filed the government's amicus brief. In fact, Judge Bork has roundly denounced the use of Enforcement Clause powers to support such congressional action.

As a Yale Law School Professor in 1972, the nominee attacked the ruling in *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966)—which authorized Congress's broad use of Enforcement Clause powers in the Voting Rights Act—as "revolutionary constitutional doctrine, for it overturns the relationship between Congress and the Court. . . . It is for the Court to say what constitutional commands mean and to what situations they apply." ("Constitutionality of the President's Busing Proposals," *American Enterprise Institute,* May 1972, at 10.)

Four years after leaving his Justice Department post, then-Professor Bork testified against "decisions that declare a congressional power to define substantive rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments. . . . [It is] my conviction that each of these decisions represents very bad, indeed pernicious, constitutional law." (The Human Life Bill, Hearings at 314.)

In both 1972 and 1981, before and after he was the "attorney for the Government" filing an amicus brief favoring the use of such

powers in *Runyon*, Judge Bork opposed the use of broad Enforcement Clause powers.[10]

Insofar as the nominee did have more leeway as Solicitor General when he filed amicus briefs than when he represented the government as a party, the committee finds relevant a study showing that he sided less with the pro-individual rights position than either Erwin Griswold, his Nixon-appointed predecessor, or Wade McCree, his Carter-appointed successor. According to the study, Solicitor General Bork took the pro-rights position in only 40.5 percent of his amicus briefs, compared to 62 percent for Griswold and 79 percent for McCree. (O'Connor, "The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation," *Judicature*, 1983 at 257.)

At the hearings, Judge Bork's supporters repeated their assertion that his record of amicus briefs as Solicitor General closely reflects his prospective inclinations as an Associate Justice. The preceding discussion demonstrates that such an assertion is undercut by Judge Bork's own words, his analyses of the principle underlying a key case and his cumulative amicus record as Solicitor General.

2. Judge Bork's Role as Solicitor General Is Not Particularly Relevant

The above discussion illustrates that Judge Bork's role as Solicitor General was substantially less reflective of his personal or legal viewpoints than his supporters have characterized it. By his own admission before this committee in 1973, he viewed his role as that of "the government's appeal lawyer." Even in submitting amicus briefs when the government was not a party to a suit, he acknowledged that his position was substantially restricted by the views of other Justice Department officials and federal agencies.

Judge Bork's prior and subsequent assessment of the doctrine governing *Runyon* v. *McCrary*—among the most prominent cases for which the nominee submitted an amicus brief—demonstrate his relatively limited ability to express his own views as Solicitor General. And the conclusions in the *Judiciary* study about Judge Bork's cumulative record of amicus briefs filed as Solicitor General certainly suggest that, within that limited scope of discretion open to him, he was not the great friend to individual rights that his supporters would depict.

B. Court of Appeals Judge

The committee has carefully analyzed Judge Bork's record as an intermediate judge on the United States Court of Appeals for the District of Columbia Circuit. Based on this analysis, two conclusions can be drawn. First, the fact that none of Judge Bork's majority opinions has ever been reversed tells us little about the nomi-

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[10] It might be contended that *Runyon* was a case that fell within Judge Bork's own rules for acceptable use of the Enforcement Clauses—that is, his view that the clauses simply allow Congress to pass laws giving individuals the right to sue and collect damages for actions that the courts have found to violate the relevant constitutional amendment. The courts have not, however, found that private discrimination in contract-making is barred by the Thirteenth Amendment itself. In *Runyon* the courts did not define private discrimination in the making and enforcement of contracts as a violation of the Thirteenth Amendment; rather, Congress did so. This is precisely "the power to define the substantive content of [constitutional] guarantees themselves," (*Human Life Bill* Hearings, at 314), that Judge Bork has consistently condemned.

nee's suitability for the Supreme Court. Second, several of Judge Bork's opinions demonstrate that he has often taken an activist role and that on occasion he has been insensitive to the claims of minorities.

1. The Lack of Reversals Says Little About the Nominee's Suitability for the Supreme Court

It is true that none of Judge Bork's majority opinions has been reversed by the Supreme Court. More importantly, however, none of Judge Bork's majority opinions has ever been **reviewed** by the Supreme Court.[11] Accordingly, the lack of reversals says little about Judge Bork's suitability for the Supreme Court.

It has been suggested that the failure of the Supreme Court to review any of Judge Bork's opinions is itself significant, perhaps implying a judgment by the Supreme Court that his opinions are correct. Such an implication is completely unsupportable. As former Chief Justice Burger testified, "the Court does not explain why it denies review." (Comm. Print Draft, Vol. 2, at 700.) In fact, as Professor Judith Resnik said, "[The Supreme] Court has reminded us time and time again that the fact that it does not take a case [for review] has absolutely zero legal weight." (Comm. Print Draft, Vol. 2, at 1247.) Many cases decided by the court of appeals may be in error, but will nevertheless not be changed by the Supreme Court due to the extremely limited capacity of that Court to review cases.

Conceding the fact that the failure of the Court to review a lower court decision means nothing, the final attempt to make something of Judge Bork's appellate record relies upon the number of decisions he has written or participated in that have not been reversed (almost all of them were not reviewed, either). Judge Bork's supporters cite the 110 or so majority decisions he has written and the more than 400 decisions he has joined. These statistics are of little utility. In any year, the courts of appeals decide about 31,000 cases, while the Supreme Court receives about 5,000 cases for review and renders opinions in only 150 to 170.

In short, the assertions based on statistics do not add up. As Professor Resnik said, "I think we are all too sophisticated here to realize that those numbers cannot tell us very much." (Comm. Print Draft, Vol. 2, at 1246.)

2. As an Intermediate Court Judge, the Nominee Has Been Constitutionally and Institutionally Bound to Follow Supreme Court Precedent

There is yet another reason why, in the committee's view, the statistical summaries of the nominee's Court of Appeals record do not support his elevation to the Supreme Court. As an intermediate court judge, the nominee has been constitutionally and institutionally bound to respect and apply Supreme Court precedent. Indeed, Judge Bork has explicitly recognized that duty in some of

[11] Until recently, in all of Judge Bork's majority opinions, review had not been sought by either party or review had been denied. While the Supreme Court has recently granted certiorari in one case in which Judge Bork wrote a majority opinion (*Finzer* v. *Barry*, 798 F.2d 1450 (D.C. Cir. 1986), *cert. granted sub nom. Boos* v. *Barry*, 107 S. Ct. 1282 (1987)), the Court has still never addressed the merits of any of Judge Bork's majority opinions.

his decisions. (*See Franz* v. *United States,* 712 F.2d 1428 (D.C. Cir. 1983); *Dronenburg* v. *Zech,* 741 F.2d 1388 (D.C. Cir. 1984).) Thus, Judge Bork's lack of reversals says nothing about his potential for activism if confirmed as an Associate Justice on the Supreme Court, where he would be free of such restraints.

During his testimony, Judge Bork distinguished between the role of a court of appeals judge and that of an Associate Justice. The exchange between Judge Bork and Chairman Biden on this issue is particularly telling:

> The CHAIRMAN. As I understand the law . . ., a Supreme Court Justice is not bound as a matter of constitutional law to accepting the precedent that has gone before if he or she has another reason or rationale to disregard [it]. . . .
>
> Judge BORK. That is entirely true. . . .
>
> The CHAIRMAN. But a circuit court judge may not overrule constititutional principles stated by the Supreme Court. Is that not also correct?
>
> Judge BORK. That is also correct. It depends on the application of the principle. (Comm. Print Draft, Vol. 1, at 433.)

Also revealing is the colloquy between Senator Heflin and Judge Bork:

> Senator HEFLIN. [A]s an Appeals Judge, of course, some of your own personal views are restricted by certain decisions, and are narrowed to the issue that might be before you.
>
> If you are confirmed and go on to the . . . Supreme Court, while there will be some restrictions, you will be pretty well free to express your own beliefs as you see fit do so on the issue that is before you; is that not true?
>
> Judge BORK. Yes. I would not say I was free in the sense that I was free as a professor; not at all. But obviously, a Supreme Court is freer than a Court of Appeals is. . . . (Comm. Print Draft, Vol. 1, at 680.)

3. Several of Judge Bork's Opinions Show Him to Be a Judicial Activist Who Is Insensitive to the Claims of Minorities and Women

Several of Judge Bork's opinions on the D.C. Circuit show him to be not an apostle of judicial restraint but a marked judicial activist. The committee believes that a brief recitation of some of these cases illustrate this point, and demonstrate that Judge Bork has often been insensitive to the claims of minority and disadvantaged groups.

a. Vinson v. Taylor

Vinson v. *Taylor,* 753 F.2d 141, *rehearing denied,* 760 F.2d 1330 (D.C. Cir. 1985), *aff'd sub nom. Meritor Savings Bank* v. *Vinson,* 106 S. Ct. 2399 (1986), is the leading case on sexual harassment in the workplace. It is clear from a careful reading that Chief Justice Rehnquist's opinion for a unanimous Supreme Court took a far more sensitive approach to liability for such harassment than did

Judge Bork's dissent from the D.C. Circuit's decision not to rehear the case en banc.

The facts can be briefly summarized. Vinson, a bank teller, claimed that her supervisor insisted that she have sex with him and that she did so because she feared she would be fired if she did not. Vinson claimed that over the next several years, her supervisor made repeated sexual demands, fondled her in front of other employees, exposed himself to her and forcibly raped her on several occasions. The trial court dismissed the claim, saying that their relationship was "voluntary." The D.C. Circuit reversed, holding that if the supervisor made "Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever."

The D.C. Circuit was asked to rehear the case, and the full court declined. Judge Bork dissented from the denial of the rehearing. Attacking the original decision, Judge Bork argued that "voluntariness" should be a complete defense in a sexual harassment case. He said that "[t]hese rulings seem plainly wrong. By depriving the charged person of any defenses, they mean that sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, to so characterize it." (760 F.2d at 1330.)

Writing for a unanimous Supreme Court, then-Justice Rehnquist held that the correct test for sexual harassment was whether the employer created "an intimidating, hostile, or offensive working environment." On behalf of the Court, he concluded that "[t]he correct inquiry is whether [plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." (106 S. Ct. 2406.)

The *Vinson* decision is fundamentally important on the question of sexual harassment in the workplace, a problem that is all too common. The factual contexts that give rise to such problems, and the Supreme Court's decision, were summarized in a colloquy between Chairman Biden and Professor Barbara Babcock:

> Chairman BIDEN. If a woman is in an environment in the workplace where she believes that if she does not have sexual relations with her boss, that she will either not get promoted, or she will be fired, or that things will not go well for her there, and she believes that, and notwithstanding the fact that she is not physically coerced, that she voluntarily goes to bed with her employer at his request, as I read the Supreme Court case, they said that, even though she voluntarily went to bed, there can be circumstances surrounding that incident that in effect made it harassment. Is that correct?
>
> Professor BABCOCK. That is exactly what the Supreme Court unanimously held. (Comm. Print Draft, Vol. 2, at 965.)

Judge Bork's position on liability for sexual harassment was not reflected by the Supreme Court. While some witnesses appearing on Judge Bork's behalf, as well as some members of the committee, have argued that Judge Bork and the Supreme Court

adopted essentially the same positions, this claim is inaccurate. The crux of the issue lies in "the difference between what is voluntary and what is welcome." (Comm. Print Draft, Vol 2., at 969.) And the committee agrees with Judge Hufstedler's assessment of the sharp difference between these two concepts:

> I will put it this way. A decision by a dissident who wants to leave the Soviet Union who is told, yes, you can leave; of course, your family must stay. You can say that he stayed voluntarily. Did he stay because he welcomed that choice? That is the problem with respect to the female employee who is put into this sexual harassment situation. And the difference is, Judge Bork treated the issue of voluntariness without recognizing that when the elements of choice are so far reduced, so, you do it, you go to bed with me or you are not going to be promoted, or fired, is my way of saying that is the kind of non-choice you get.
>
> So that that is a very significant difference between the way Judge Bork viewed the situation and the way the Supreme Court did. (Comm. Print Draft, Vol. 2, at 969–70.)

As summarized by Professor Babcock, Judge Bork's position

> just fails to recognize the seriousness of sexual harassment as a tremendous burden to women's equality in the workplace. When he talks about voluntariness as a defense, the Supreme Court says it is not voluntariness; it is whether these are unwelcome advances.
>
> This is just a completely different way of looking at it. The Supreme Court does not use words like 'dalliance' when it is talking about sex discrimination. It uses words like allegations of serious criminal offenses. . . . [Judge Bork] was talking about voluntariness. The Supreme Court is talking about whether it is unwelcomed. (Comm. Print Draft, Vol. 2, at 970.)

b. Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co.

Judge Bork's opinion in *Oil, Chemical and Atomic Workers International Union* v. *American Cyanamid Company*, 741 F.2d 444 (D.C. Cir. 1984), offers a restrictive interpretation of a key Congressional statute. In a telling way, Judge Bork's approach to the case complements his *Vinson* decision in demonstrating his insensitivity to conditions of workplace coercion. It also minimizes the significance of procreative freedoms in our society.

The case arose out of the decision of the American Cyanamid Company to exclude from its Willow Island, W. Va., plant all women of childbearing age unless a woman offered proof of surgical sterilization. (741 F.2d 444, 445.) The company adopted this policy in order to prevent further exposure of women workers to lead, a toxic substance according to Occupational Safety and Health Act regulations. (29 C.F.R. Part 1910.1025; Occupational Exposure to Lead, 43 Fed. Reg. 52952 *et seq.* (Preamble) and 43 Fed Reg. 54353 *et seq.* (Attachments to the Preamble for the Final

Standard).) The policy was an alternative to compliance with the lead exposure standards.

After five women underwent surgical sterilization to retain their jobs, the Secretary of Labor issued a citation alleging a violation of the "general duty clause" of the Occupational Safety and Health Act. This clause commands that employers "furnish to each of his employees . . . a place of employment . . . free from recognized hazards that are likely to cause death or serious physical harm to his employees." (29 U.S.C. Section 654(a)(1).) The "general duty" clause furthers OSHA's policy "to assure so far as possible every working man and woman in the nation safe and healthy working conditions. . . ." (29 U.S.C. Section 651(b).)

American Cyanamid attempted to comply with the general duty clause by forcing some of its women workers to submit to surgical sterilization or be fired. This policy affected women between the ages of 16 and 50 years. (741 F.2d 444, 446.)

In his opinion for the court, Judge Bork upheld the decision of the Occupational Safety and Health Review Commission that the policy was not covered under OSHA, so that the employees had no rights under the Act to prevent implementation of the policy.

Judge Bork's opinion failed to mention that a previous decision of the D.C. Circuit suggested that under OSHA, the exclusion of fertile women from the workplace might be actionable. (*See United Steelworkers of America* v. *Marshall,* 647 F.2d 1189, 1238 n. 74 (D.C. Cir. 1980).) In *Marshall,* the court wrote: "We think that fertile women can find statutory protection from such discrimination in the OSH Act's own requirement that OSHA standards ensure that 'no employee will suffer material impairment of health. . . .'" (*Id.*)

In his opinion, Judge Bork implied that the harm from lead exposure was a risk faced only by women workers and developing fetuses. In fact, OSHA found that "[m]ale workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy." (29 C.F.R. Section 1910.1025 (1978) at 815; *see also* Attachments to Final Standard for Occupational Exposure to Lead, 43 Fed. Reg. 54421, 54424 (1978).) These findings were upheld by the court in *Marshall.* (647 F.2d at 1256–58.)

Judge Bork's opinion also suggests that the company had no alternative but to dismiss women who chose not to be sterilized. (741 F.2d at 450.) And as Judge Bork testifed in response to questions from Senator Hatch: "[T]his was a case with no satisfactory solution for anybody. I mean there was nothing to do. There was no satisfactory way to solve it." (Comm. Print Draft, Vol. 1, at 714.)

The record of this case shows, however, that a number of alternatives were proposed by the Union petitioners and the Secretary of Labor in the proceedings below and that the Oil, Chemical and Atomic Workers (OCAW) had asked the court to permit fact-finding on the question of whether there were alternatives to the sterilization policy. In its brief, the union stated:

> OCAW and the Secretary [of Labor] offered in the Commission Proceedings to present evidence to establish that Cyanamid could have provided protection to fetuses without requiring the surgical sterilization of employees, and they

> sought discovery to refute Cyanamid's opposing contentions. But because the ALJ [administrative law judge], at Cyanamid's urging, disposed of the case by adopting the threshold position that the sterilization rule wasn't a hazard cognizable under the Act, a factual record was not made on this seriously disputed point. (Comm. Print, Vol. 3, at 1630–31.)

Judge Bork's opinion precluded fact-finding on this central issue—whether there were alternatives to the policy adopted by American Cyanamid.

Judge Bork's opinion and his testimony before the committee illustrated his failure to appreciate the coercive nature of the "choice" American Cyanamid presented to its women workers. When he testified before this committee, Judge Bork said the company "offered a choice to the women. Some of them, I guess, did not want to have children." (Comm. Print Draft, Vol. 1, at 448.) Later he said that "I suppose the five women who chose to stay on that job with higher pay and chose sterilization—I suppose that they were glad to have the choice—they apparently were—that the company gave them." (Comm. Print Draft, Vol. 1, at 450.) But the telegram and letter sent to this committee by Betty Riggs—a woman who submitted to sterilization rather than lose her job—highlighted Judge Bork's insensitivity to the dilemma that confronted these women.

This discussion of "choice" is reminiscent of Judge Bork's use of "voluntary" to describe situations of sexual harassment in the workplace. (*See* Section (a), *supra*, discussing *Vinson.*) In a telegram received by Senators Metzenbaum and Biden, Betty Riggs, a woman who submitted to sterilization rather than lose her job, told the story of her choice:

> I cannot believe that Judge Bork thinks we were glad to have the choice of getting sterilized or getting fired. Only a judge who knows nothing about women who need to work could say that. (Comm. Print Draft, Vol. 1, at 539.)

In her subsequent letter, dated September 28, 1987, Ms. Riggs spoke clearly of economic coercion and humiliation:

> I had surgery because I had to have the job and felt I had no choice. If I lost my job I would have lost my home and I also needed it to help support my parents, my father was totally blind and my mother had emphysema. . . .
>
> During this time we were harassed, embarassed, and humiliated by some supervisors and some fellow workers They referred to us like animals, such as dogs being spaded or neutered. They told us we were branded for life.

Professor Kathleen Sullivan explained the problems with Judge Bork's opinion:

> Judge Bork did not see the fundamental right to make our own decisions about procreation, whether we are going to have children . . ., as creating a special need for sensitivity in this case. He did not see that fundamental liberty

to procreate as demanding a reading of the statute that would have protected these women.

After all, getting sterilized is not just a safety precaution like putting on a gas mask when there are fumes in the factory or using an extra ladder when you are climbing up a height. Getting sterilized, as Justice Douglas said for a unanimous Court, in *Skinner* v. *Oklahoma* in the 1940's [provides] . . . no redemption. . . . Once sterilized, there is no redemption. And I think finally, Senator Metzenbaum, to see it as a choice, an act of free will—be sterilized or feed my children—I think we all know that is not a truly free choice. . . .

All we can say from Cyanamid . . . is that he was not sensitive in his reading of the statute to the importance of our powers of childmaking, our right to procreate, when he read that statute, and that is a sensitivity I would hope that a Justice of the Supreme Court would have. (Comm. Print Draft, Vol. 3, at 1624.)

c. Bartlett v. Bowen

In *Bartlett* v. *Bowen*, 816 F.2d 695 (D.C. Cir.), *reh. denied*, 824 F.2d 1240 (D.C. Cir. 1987), Judge Bork adopted in dissent a novel and unprecedented approach to the doctrine of sovereign immunity (pursuant to which a governmental unit can be sued only if it consents). The plaintiff, Josephine Neuman, a member of the Christian Science faith, entered a Christian Science nursing facility and received care until she died. Medicare refused to pay the $286 for the nursing home care. Ms. Neuman's sister, Mary Bartlett, sued on the ground that the refusal to provide benefits violated First Amendment rights of the free exercise of religion. The Medicare Act, permitted "judicial review" of a "final decision" of the Secretary of the Department of Health and Human Services only if the amount in controversy is $1,000 or more. The issue in *Bartlett* was whether that statute barred federal court review of the First Amendment claim.

The majority held that the federal courts could review the constitutional claim. Judge Bork dissented and, in the words of the majority, "relie[d] on an extraordinary and wholly unprecedented application of the notion of sovereign immunity to uphold the Act's preclusion of judicial review." (*Id.* at 703.) The majority said that Judge Bork took "great pains to disparage" a leading Supreme Court decision, which suggested that Congress could not preclude review, as Judge Bork would have it, of constitutional claims. And, continued the majority, Judge Bork "ignore[d] clear precedent" from his own Circuit that followed the Supreme Court decision and made "no mention of the Supreme Court's very recent affirmation of [the decision]—using exactly the same language." (*Id.* at 702–03.) The majority concluded that Judge Bork's view that Congress may not only legislate, but also may "judge the constitutionality of its own actions," would destroy the "balance implicit in the doctrine of separation of powers." (*Id.* at 707.) Thus, according to the majority, Judge Bork's

> sovereign immunity theory in effect concludes that the doctrine . . . trumps every other aspect of the Constitution. According to [Judge Bork], neither the delicate balance of power struck by the Framers among the three branches of government nor the constitutional guarantee of due process limits the government's assertion of immunity. Such an extreme position cannot be maintained. (*Id.* at 711.)

As Professor Judith Resnik concluded, Judge Bork "deployed the doctrine of sovereign immunity in an innovative and unusual manner. . . ." (Resnik statement, Comm. Print Draft, Vol. 2, at 1157–58.) The committee shares Professor Resnik's view that *Bartlett* is an "example of Judge Bork's efforts to insulate the government from having to respond to its citizens' allegations of illegal behavior." (*Id.* at 1158.)

d. Dronenburg v. Zech

Another example of Judge Bork's activist approach is *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984). Judge Bork's majority opinion affirmed the dismissal of the Navy's discharge of a nine-year veteran for engaging in consensual homosexual activity. After a lengthy recitation of the Supreme Court's line of privacy decisions creating what he deemed as "new rights," (*id.* at 1395), Judge Bork claimed that he could find no "explanatory principle" in them, and then argued that lower federal courts were required to give very narrow readings to them because the courts "have no guidance from the Constitution or . . . from articulated Supreme Court principle." (*Id.* at 1396.)

Judge Bork's theory of lower court jurisprudence in *Dronenburg*—a theory that has never been expressed or endorsed by the Supreme Court—as well as his criticism of the privacy decisions, led four members of the D.C. Circuit to caution Judge Bork, in their dissent from the denial of the petition for rehearing en banc, about the proper role of the court:

> [Judge Bork's] extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case before the court. . . . **We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint.** Regardless whether it is the proper role of lower courts to 'create new constitutional rights,' surely it is not their function to conduct a general spring cleaning of constitutional law. **Judicial restraint begins at home.** (746 F.2d 1579, 1580; emphasis added.)

* * * * * * *

Judge Bork's supporters have made much of his Solicitor General and Court of Appeals records. The committee finds little in those records that mitigate the objections to his confirmation that have been outlined in other sections of this report. Indeed, parts of those records confirm some of those objections.

X. JUDGE BORK'S SO-CALLED "CONFIRMATION CONVERSION:" THE WEIGHT THE SENATE MUST GIVE TO NEWLY ANNOUNCED POSITIONS

As Senator Leahy has said, Judge Bork throughout the hearings told the committee many things "that he has never told anyone else before—at least not in public—about his approach to fundamental constitutional issues." (Statement of Senator Leahy, September 30, 1987, S 13128, S 13129.) Much of has been made of this so-called "confirmation conversion."

In the committee's view, the issue is not whether Judge Bork was candid in those aspects of his sworn testimony that seem to contradict many of his previously announced positions. In Senator Specter's words, "it is not a matter of questioning his credibility or integrity, or his sincerity in insisting that he will not be disgraced in history by acting contrary to his sworn testimony. . . ." (Specter statement, Congressional Record, Oct. 1, 1987, S 13319.) Rather, "the real issue is what weight the Senate should give to these newly expressed views," (Leahy Statement at 6), in light of Judge Bork's "judicial disposition in applying principles of law which he has so long decried." (Specter statement, Cong. Record, S 13319.)

The committee has concluded that Judge Bork's newly announced positions are not likely fully to outweigh his deeply considered and long-held views. The novelist William Styron cut to the heart of this matter when he said that the Senate must decide whether Judge Bork's new positions reflect "a matter not of passing opinion but of conviction and faith." (Comm. Print Draft, Vol. 2, at 585.) "Measured against this standard, Judge Bork's testimony . . . mitigates some of his previous statements, but does not erase them from the record which the Senate must consider." (Leahy statement, Cong. Record at S 13129.) Underscoring this conclusion is, in Senator Heflin's words, "the absence of writings or prepared speeches which recite a change in his earlier views and the reasons for such change." (Heflin Closing Statement at 4.) In the end, the committee is concerned that Judge Bork will bring to the "constitutional controversies of the 21st century" the conviction and faith of his long-held judicial philosophy and not that of his newly announced positions.

There were three principal changes in positions that Judge Bork announced for the first time, at least publicly, at the hearings. These related to: (1) the Equal Protection Clause of the Fourteenth Amendment and gender discrimination, (2) dissident political speech under the First Amendment; and (3) First Amendment protection for artistic expression.

At his confirmation hearings, Judge Bork for the first time said that he would apply the Equal Protection Clause to women pursuant to a "reasonable basis" standard. As discussed in Part Three, Section III, *supra*, this position contrasts markedly with Judge Bork's historical approach to this issue. The committee agrees with Senator Specter's statement that there is

> substantial doubt about Judge Bork's application of this fundamental legal principle where he has over the years disagreed with the scope of coverage and has a settled philosophy that constitutional rights do not exist unless speci-

> fied or are within original intent. (Specter statement, Cong. Record, S 13318.)

And, as Senator Leahy concluded:

> Based on the record before the Senate, even including the new perspective provided by Judge Bork's own testimony, this nominee's conception of the Equal Protection Clause is not broad and dynamic enough to reassure me that as a Justice of the Supreme Court, he will respond to these claims in the way the American people have a right to expect. (Leahy statement, Cong. Record at S 13132.)

On the question of dissident political speech—that is, speech that advocates the violation of law—Judge Bork also announced a dramatic change in position. As discussed in Part Three, Section IV(D)(1), *supra*, Judge Bork had, prior to the hearings, consistently rejected the "clear and present danger" test even though a unanimous Supreme Court had accepted it for years. During the hearings, Judge Bork took inconsistent positions on this issue, but ultimately said that he accepted the Supreme Court's formulation as "settled law." Again, the statements of Senators Specter and Leahy are particularly cogent. Said Senator Specter:

> I have substantial doubt about Judge Bork's application of [the clear and present danger] standard to future cases involving different fact situations where he retains his deep-seated philosophical objections. (Specter statement, Cong. Record at S 13319.)

Senator Leahy observed:

> [I]n the end, I am not persuaded that Justice Bork would be an energetic and effective guardian of this most basic of our constitutional freedoms. Belated acceptance of these well-established principles does not match what we expect of a Supreme Court Justice. (Leahy statement, Cong. Record at S 13131.)

The third principal area in which Judge Bork modified his views is the area of artistic expression. Prior to the hearings, Judge Bork had expanded his concept of protected speech under the First Amendment from his original and somewhat radical position set forth in his *Indiana Law Journal* article. He had still seemed to maintain, however, that speech must relate in some way to the political process. By the time of his testimony, Judge Bork accepted the proposition that speech should be protected regardless of its lack of relationship to the political process. He accepted, in other words, "a consensus that has existed for decades." (Leahy statement, Cong. Record at S 13130.) As Senator Leahy concluded:

> While this testimony was welcome, it still must be read against the background of Judge Bork's prior statements on the issue. . . . The over-all picture presented by Judge Bork's free speech decisions and his writings on the subject belies the extravagant claim made by some of the proponents of this nomination that he is 'at the forefront' of modern free speech jurisprudence. At best he is some-

where in the pack and running to catch up. (*Id.* at S 13130, S 13131.)

Any discussion of the so-called "confirmation conversion" would not be complete without mention of the principal area in which Judge Bork did not change his views. On the related questions of liberty, unenumerated rights and the right to privacy, Judge Bork's views have not changed in any substantial degree. He still challenges the role of the Supreme Court in defining liberty; he still challenges the legitimacy of *Griswold* and its progeny; and he still maintains that the people of the nation have only those rights that are specified in the text of the Constitution.

The hearing record is, therefore, quite clear. In some areas, Judge Bork has come to rest at a point near the consensus that was reached by the Supreme Court and by most legal scholars almost a quarter-century ago. In other areas, Judge Bork's views have not changed at all, and place him at odds with every Supreme Court Justice, past or present. Once again, Senator Leahy's words reflect the conclusion of the committee:

> This . . . shows that Judge Bork's views are now different from some of the more isolated positions he previously sought to defend. But it also shows that, at this point in his long career, he still does not demonstrate a passion for vindicating the individual rights of Americans that matches his passion for a rigorous and coherent legal theory of the Constitution. (Leahy statement, Cong. Record at S 13129.)

And in the words of Senator Heflin:

> A life-time position on the Supreme Court is too important a risk to a person who has continued to exhibit—and may still possess—a proclivity for extremism in spite of confirmation protestations. (Heflin closing statement at 6.)

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PART FOUR: CONCLUSION

The hearings before this committee on the nomination of Robert H. Bork have been about what the Framers called "free government." And free government, as one witness put it, "is a complicated blend of principle and preference." (Written statement of Owen Fiss, Comm. Print Draft, Vol. 2, at 1071.) Through these hearings, millions of Americans have been reminded that free government "empowers the majority and makes it the touchstone of legitimacy, but at the same time it protects individuals, minorities, and powerless groups in our society against laws and practices that are sometimes demanded by a majority but which might be deeply regretted by the people at more reflective moments." (*Id.*)

Two hundred years ago, the founders of this great Nation created a Constitution for their heirs and descendants, enabling them continually to refine the balance between principle and preference. Our Constitution has scarcely more than 5,000 words. But those words have enabled this Nation to flourish for two centuries, and they now lead us into a third.

At the same time, the Constitution's words alone have never been deemed sufficient to gain its ends. As John Randolph reminded the new nation, "[y]ou may cover whole skins of parchment with limitations, but power alone can limit power." (W.C. Bruce, *John Randolph of Roanoke* (1922), Vol. II at 211.) Faithful to this mandate, the Supreme Court has been the ultimate bulwark of protection when the majority has attempted to impose its preference upon the fundamental principles of the Constitution—when it has attempted, in other words, to channel the force of government to override the rights of the individual. In the words of former Congresswoman Barbara Jordan, "[t]he Supreme Court will throw out a lifeline when the legislators and the governors and everybody else refuse[s] to do so." (Comm. Print Draft, Vol. 1, at 795.) In large part, because of the Supreme Court, "[w]e are held together as a nation by a body of constitutional law constructed on the premise that individual dignity and liberty are the first principles of our society." (Coleman testimony, Comm. Print Draft, Vol. 1, at 740.)

Judge Bork's constitutional philosophy places him at odds with this history and tradition. As Judge Hufstedler said:

> In examining Judge Bork's record as an academician, as a high-ranking member of the Executive Branch of the federal government, and as a judge, the evidence discloses his quest for certitudes to resolve the ambiguities of the Constitution and of the Supreme Court's role in constitutional adjudication, and an effort to develop constitutional litmus tests to avoid his having to confront the grief and the un-

tidiness of the human condition. (Comm. Print Draft, Vol. 2, at 921.)

Several examples illustrate Judge Hufstedler's point. Judge Bork reads the Constitution not with Judge Learned Hand's "spirit of liberty" (Kurland testimony, Comm. Print Draft, Vol. 3, at 1388), but in a mechanical way, as if it were a rigid legal code. It is one thing to accept as "settled law" decisions that have long been incorporated into the fabric of American life, years after the passions of battle have cooled. But the acid test of commitment to constitutional liberties comes when those liberties are under their greatest threat. Had Judge Bork's views been the governing rule on the Supreme Court at the critical moments of the last generation, principles that most Americans have come to accept would have been rejected. There would be no right to privacy. There would be no substantive content to the liberty clause of the Fourteenth Amendment. William Coleman spoke eloquently when he said:

> There . . . [is a] simple proposition[,] and this is not speaking as a black person. This is speaking as an American. That one of the greatest heritage[s] is the liberty and the privacy . . . the right to marry, you name them. This Judge reads them out of the Constitution. He has done it in his speeches before. He has done it since [he has been] on the bench. (Comm. Print Draft, Vol. 1, at 769.)

And, as John Hope Franklin told us, our civil rights landscape would be dramatically different:

> Nothing in Judge Bork's record suggests to me that had he been on the Supreme Court at an earlier date, he would have had the vision and the courage to strike down a statute requiring the eviction of a black family from a train for sitting in the so-called white coach, or the rejection of a black student at a so-called white state university; or the refusal of a white restaurant owner to serve a black patron. As a professor he took a dim view of the use of the Commerce Clause to protect the rights of individuals to move freely from one place to another; or to uphold their use of public accommodations. (Comm. Print Draft, Vol. 2, at 719.)

It is often stated that America's strength lies in being a government of laws and not of men. For such a government to endure, interpretation of our most fundamental law must comprehend the lives of the people and accord with their deepest values. The Supreme Court sets the terms of that interpretation, and its members must view the forum as far more than what the nominee has termed an "intellectual feast." Justices of the Supreme Court hold the solemn charge to embody justice, and to unleash or resolve the aspirations and grievances of a nation. Nor can constitutional interpretation be based simply on an "understand[ing of] constitutional governance," as Judge Bork also has suggested. (Comm. Print Draft, Vol. 1, at 720.) To update Justice Holmes' reminder many decades ago, the words of the Constitution

> have called into being a life the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken [two] centur[ies] and cost their successors much sweat and blood to prove that they created a nation. The case[s] before us must be considered in the light of our whole experience and not merely in that of what was said [two] hundred years ago. (*Missouri v. Holland,* 252 U.S. 416, 433 (1920).)

This broad context for the justices' role frames, in turn, the question for this committee. That question was put well by Secretary Coleman:

> In this day and age, can we really take the risk of nominating to the Supreme Court a man who fails to recognize the fundamental rights of privacy and substantive liberty . . . which are already imbedded in the very fiber of our Constitution . . . [?] (Comm. Print Draft, Vol. 1, at 740.)

The nation cannot take this risk. The positions adopted by Judge Bork at critical moments of decision bespeak a perilous inclination for one who would guide our nation's future. The constitutional problems of the next generation will take new and unexpected forms, but they will juxtapose the same values of liberty and sovereignty, of preference and principle, that antedate the birth of our Constitution. Judge Bork's confined vision of the Constitution and of the task of judging itself carries too great a risk of disservice to future national needs and distortion of age-old constitutional commitments to permit his confirmation.

The hearings were, for this committee, a return to first principles: an exploration of the role of the Constitution and the Supreme Court in the government fashioned by our founders 200 years ago. When the Framers, in Madison's phrase, "reared the fabrics of government which have no models on the face of the globe," they passed to their descendants the blessings and burdens of free government. Under our living Constitution, the Supreme Court has the continuing task of harmonizing the liberty and popular sovereignty, the preference and principle, that comprise free government. Dean Robert Bennett described the process of this task well when he said:

> Ours is one in which sensitive questions of application constantly arise that cannot be solved by any easy reference to constitutional language, to original intention or to any other simple key to constitutional meaning. They must be solved with the historical evidence as the starting point, and with heavy reliance on the good sense and restraint of the judicial branch, guided in the time-honored fashion of the common law by the accumulated wisdom of a system of precedent. (Bennett statement, Comm. Print Draft, Vol. 2, at 1236.)

By this process, the Supreme Court acts to define our lasting values as a people. In exercising powers of advice and consent for Justices of the Supreme Court, the Senate must speak for generations yet unborn, whose lives will be shaped by the fundamental

principles that those Justices enunciate. As we face that task here today, we keep faith with our forefathers' bold experiment by reaffirming for **our** time their promise that liberty would be the American birthright for **all** time.

ADDITIONAL VIEWS OF SENATOR LEAHY

Although I join the majority report on the nomination, I write separately to explain the particular reasons why I recommend against confirmation of Robert Bork to be Associate Justice of the Supreme Court.

I am not opposed to Robert Bork, the person. I have great admiration for his intellect, scholarship, and skill in crafting judicial opinions. Nor do I question his personal decency and integrity. His forthrightness in responding to the most probing and far-ranging questioning by Committee members is unparalleled, and sets a high standard that future nominees will have to work hard to match. In the hearings, Judge Bork handled himself in a way that commands not only our respect, but also our admiration for the support shown by his impressive family.

Robert Bork, the person, has my praise and respect. Robert Bork, the nominee to the Supreme Court, does not have my vote, and the President does not have my consent to this nomination.

Confirming this nominee could alter the direction the Supreme Court takes into the next century. My children will live most of their lives in that century, and my vote speaks to the legacy I would leave them—and all other Americans.

The central issue is this nomination is not Robert Bork, the person, but Robert Bork's approach to the Constitution and to the role of the Supreme Court in discerning and enforcing its commands. The central issue is his judicial philosophy. When the hearings began, I said that Judge Bork's judicial philosophy is comprehensive and clearly stated. It is also a record of consistent and forceful opposition to the main currents the Supreme Court has taken on a wide range of issues that touch on the basic freedoms of the American people. While in some areas Judge Bork departed from this longstanding record in his testimony before the Judiciary Committee, I am not convinced that his fundamental approach to constitutional principles has changed. This is a key factor in my vote on this nomination. Let me explain why.

With Judge Bork, as with any Supreme Court nominee, the record before the Senate is a record of the past: what the nominee has said and done up to the moment the Senate makes its decision. But that decision is a referendum on the future.

Whoever succeeds Justice Powell on the Supreme Court will probably serve well into the 21st Century. The Senate should confirm Justice Powell's successor only if we are persuaded that the nominee has both the commitment and the capacity to protect freedoms the American people have fought hard to win and to preserve over the last 200 years.

When the Framers of the Constitution met in Philadelphia two centuries ago, they decided that the appointment of the leaders of the judicial branch of government was too important to leave to

the unchecked discretion of either of the other two branches. They decided that the President and the Senate must be equal partners in this decision, playing roles of equal importance. The 100 members of the United States Senate, like the Chief Executive, are elected by all the people. And all the people have the right to expect that we will approach our task with care and concern for the importance of this decision for the future of our Republic.

I cannot vote for Judge Bork unless I can tell the people of Vermont that I am confident that if he were to become *Justice* Bork, he would be an effective guardian of their fundamental rights.

The people of Vermont have a right to know that as a Supreme Court Justice, Robert Bork would aggressively defend their freedom to think, speak and write as they please—without the threat of censorship or reprisal from any level or branch of government. Based on the record before me, I cannot tell the people of Vermont that Robert Bork would champion their First Amendment rights to free speech.

The people of Vermont have a right to know that as a Supreme Court Justice, Robert Bork would prevent government from intruding into the most intimate and private decisions of family life, as the Constitution provides. Based on the record before me, I cannot tell the people of Vermont that Judge Bork recognizes their right to privacy as one of their most fundamental liberties, and that he will act forcefully on that recognition.

The people of Vermont have a right to know that as a Supreme Court Justice, Robert Bork would comprehensively uphold the constitutional right to be free of unfair discrimination by any branch or level of government. Based on the record before me, I cannot tell the people of Vermont that Judge Bork will unstintingly employ the equal protection clause of the Fourteenth Amendment to block government actions based on sexual discrimination and other forms of unfounded prejudice.

From my own studies and from the nomination hearings, I know much about Judge Bork and his judicial philosophy, and I am not convinced that the nominee will protect those freedoms into the next century. Therefore, I must recommend a vote against the nominee.

As Senators decide how to vote on this nomination, much will be made of the subject of "confirmation conversion." This phrase summarizes some of the reasons why I have found this decision so difficult. But like any catch phrase, it may suggest different things to different people. Some of these connotations may be misleading.

At the hearings, Judge Bork told the Judiciary Committee many things he has never told anyone else before—at least not in public—about his approach to fundamental constitutional issues. The issue is not whether he was candid in those aspects of his sworn testimony which seems to contradict so many basic thrusts of his prior writings and speeches. Judge Bork testified under oath, and I have no reasons to think that a man of such integrity would have testified with less than complete truthfulness. The real issue is what weight the Senate should give to these newly expressed views.

There is a pattern to the new views that Judge Bork disclosed for the first time at the hearings. His evolving thinking on free speech

questions, for example, has come to rest at a point near the consensus that was reached by the Supreme Court and by most legal scholars some twenty years ago. On constitutional questions that still excite controversy within the legal mainstream—for example, the right of marital and family privacy—Judge Bork's views have scarcely changed at all.

This pattern shows that Judge Bork's views are now different from some of the more isolated positions he previously sought to defend. But it also shows that, at this point in his long career, he still does not demonstrate a passion for vindicating the individual rights of Americans that matches his passion for a rigorous and coherent legal theory of the Constitution.

A key element of the issues the Senate must confront on this nomination is whether Judge Bork's newly announced perspectives are likely to overpower the deeply considered and well documented intellectual habits of a long career as a legal philosopher. Our focus, once again, must not be limited to what Judge Bork now says about the established precedents he so forcefully attacked in the past. Our focus must be on the judicial philosophy that Judge Bork would bring to the constitutional controversies of the 21st Century.

Many distinguished lawyers testified before the Judiciary Committee on this nomination. But a non-lawyer, the novelist William Styron, went to the heart of the matter when he said that the Senate must decide whether Judge Bork's newly expressed views reflect "a matter not of passing opinion but of conviction and faith." [1] Measured against that standard, Judge Bork's testimony of earlier this month mitigates some of his previous statements, but does not erase them from the record which the Senate must consider.

When a nominee for a cabinet position comes before a Senate committee for confirmation hearings, it is not unusual for Senators to seek specific commitments as to actions the nominee will or will not take if confirmed. Senators may even condition their vote on these commitments. But a lifetime appointment to the federal judiciary is entirely different from an appointment to an Executive Branch position. In the case of a nominee to the Supreme Court, it would be improper for members of the Judiciary Committee to seek such commitments, and it would be unthinkable that any nominee would make them. The Committee's job is not to extract commitments, but to exercise judgment about the probable course of the nominee's long-term performance on the Supreme Court. Recent changes in the nominee's views, whether or not they are considered "confirmation conversions," form an important part of that judgment.

The central issue in this nomination is the question of Judge Bork's judicial philosophy: his approach to the Constitution and to the role of the courts in discerning and enforcing its commands. During the confirmation hearings that are now winding up, we heard a great deal of testimony, both from the nominee himself

[1] Transcript of Confirmation Hearings on the Nomination of Robert H. Bork (hereafter "Transcript"), 9/22/87, at 212.

and from other witnesses, about many aspects of Judge Bork's judicial philosophy.

But three issues stand out. Each is drawn from a phrase from the Constitution that evokes a core value of the American system of self-government: "freedom of speech," "liberty," and "equal protection of the laws." I am not persuaded that Judge Bork is philosophically committed to the historical role of the Supreme Court to protect these core values against actions by one of the branches or levels of government that would threaten the rights of individual Americans.

The first issue is one of freedom. The consititutional provision that embodies it is found in the First Amendment: "Congress shall make no law . . . abridging the freedom of speech." The history of judicial interpretations of this general prohibition underscores how essential this freedom is to our constitutional system. It is the freedom of every American to think, speak, and write as we please, on any subject and in any medium, without the threat of censorship or reprisal by any branch of government at any level.

This is a freedom that every American holds dear. But it has a special meaning for me. As the son of a Vermont printer, I grew up in a family which venerated this freedom above almost any other. So when I began to read Judge Bork's interpretation of the First Amendment, I was disturbed and alarmed.

The question of free speech was the centerpiece of the most significant and most widely cited law review article written by the nominee on the issue of judicial interpretation of the Constitution. Three strands of Judge Bork's view of the First Amendment concerned me. First, he emphatically asserted that "constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression." [2] Second, Judge Bork argued that "within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law." [3] The third theme of Judge Bork's views on free speech that I found troubling was developed in greater detail in some of his subsequent speeches and articles, in which he argued that the First Amendment should not prevent state and local governments from punishing people who speak, even on "explicitly political" topics, in a way that the majority of the community finds "offensive." [4]

To understand why I was so concerned about these views, it is worth reminding ourselves what freedom of speech really means under the law today. In case after case, the Supreme Court has been called upon to apply the general words of the First Amendment to a variety of concrete factual situations. Those cases have established the practical contours of freedom of speech in each of the areas questioned by Judge Bork.

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[2] Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 20 (1971) (hereafter "Indiana LJ").

[3] *Id.*

[4] Bork Speech at Justice and Society Seminar, 8/13/85, at 6; Bork Speech at University of Michigan, 2/5/79 (hereafter "Michigan Speech"), at 18.

First, consistent with the First Amendment, these cases affirm that, in America, all kinds of speech are protected: speech that directly concerns the process of self-government, but also speech that has nothing to do with politics.[5] The candidate on the stump and the orator on the soapbox may speak without fear of government censorship or reprisal. But so also may the scientist in the laboratory and the entertainer on the stage or screen, large or small. The author of a best-selling novel is protected by the First Amendment; so is the poet publishing in an obscure journal. The painter, the sculptor, the composer may follow their muses wherever they may lead, free of the fear that official disfavor may squelch or constrain their creativity.

Second, a series of Supreme Court cases affirms that government may not arbitrarily suppress even speech that confronts government with a challenge to its legitimacy or with advocacy of disobedience of law. Only when such speech presents the danger of imminent lawless activity may it be curbed.[6]

Finally, it is clear that the First Amendment forbids censorship not only when the government dislikes what we say, but also when it dislikes how we say it. When speech is not legally obscene, the majority of the community may consider it offensive, or even immoral, but the Constitution will not allow the majority to gag the minority—even a minority of one—on that account.[7]

Taken together, these strands of the First Amendment's free speech clause form the backbone of a system of freedom of expression unparalleled in any other nation. We sometimes overlook the vital part that this system has played in making America the most vibrant, creative, prosperous and confident society in the world today. Freedom of speech has guaranteed the diversity of thought that keeps our democracy vital as it enters its third century.

When Judge Bork testified before the Judiciary Committee, I questioned him extensively about each troubling aspect of his approach to the application of the First Amendment guarantee of freedom of speech. His answers were detailed and comprehensive.

Judge Bork's testimony was most nearly reassuring on the question of First Amendment protection for non-political speech. Referring to the well established principle that speech is protected regardless of its lack of relationship to the political process, Judge Bork said, "That is what the law is, and it is law I accept."[8] While this testimony was welcome, it still must be read against the background of Judge Bork's prior statements on the issue.

Judge Bork may have long ago abandoned the "bright-line" distinction between protected political and unprotected non-political speech, but his responses to interviewers as recently as this past May and June clearly state that the existence of First Amendment protection should be affected by where speech falls in relation to a "wavering line" between speech that feeds into the "way we

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[5] *See Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection").

[6] *E.g. Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Hess v. Indiana*, 414 U.S. 105 (1973).

[7] *E.g. Cohen v. California*, 403 U.S. 15 (1971).

[8] Transcript, 9/17/87, at 192.

govern ourselves" and speech that does not, a line that must be drawn on a "case by case basis." [9]

When he came before the Judiciary Committee, Judge Bork conceded that this line, whether bright or "wavering," is irrelevant to the scope of the First Amendment. [10] By his confirmation testimony, Judge Bork accepted a consensus that has existed for decades.

On the question of protection for speech that advocates the violation of law, my questioning focused on Judge Bork's evaluation of the leading Supreme Court case on the subject, the 9–0 decision in the 1969 case of *Brandenburg* v. *Ohio*. [11] Judge Bork sharply criticized this decision on a number of occasions and at least once described it as "fundamentally wrong." [12] When I asked him about it, Judge Bork stated, for the first time in public that "the *Brandenburg* position . . . is okay; it is a good position." [13] The next day, he gave a slightly different response to a question from Senator Specter: "I think *Brandenburg* . . . went too far, but I accept *Brandenburg* as a judge and I have no desire to overturn it. I am not changing my criticism of the case. I just accept it as settled law." [14]

Finally, on the question of whether a community can punish even political speech because it uses offensive words, the leading case, *Cohen* v. *California*, struck down a conviction of a young man for disorderly conduct for using a four-letter word to express his opposition to the Selective Service Act. [15] Judge Bork consistently has criticized this decision, but his testimony on his current position was somewhat ambiguous. While he embraced the general principle that "no community can override any guarantee anywhere in the Constitution," [16] he also reiterated his long-standing criticism of the reasoning of Justice Harlan in the *Cohen* case, stating "I feel precisely the same way as I did" on the occasions of his previous attacks on the decision. [17]

The testimony on all three of these points is inconsistent with much of what Judge Bork had said on these topics as recently as a few months before he walked into the Senate Caucus Room as a nominee for the Supreme Court. A review of Judge Bork's decisions as an appellate judge in First Amendment cases does not resolve these inconsistencies. Most of these decisions involve either speech that Judge Bork deemed political, and therefore indisputably protected, or issues rather closely controlled by Supreme Court precedent that any lower court judge is bound to apply. [18] Interestingly, in the only majority decision by Judge Bork that the Supreme Court has ever decided to review, the nominee sustained a statute that permits the government to discriminate between competing speakers on political topics based on the content of the speech. [19]

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[9] Bork Interview for WorldNet, June 10, 1987 (hereafter "WorldNet Interview"), at 26; Bork Interview with Bill Moyers, May 28, 1987, at 35.
[10] Transcript, 9/17/87, at 193.
[11] 395 U.S. 444 (1969).
[12] Michigan Speech, at 21.
[13] Transcript, 9/16/87, at 115.
[14] Transcript, 9/17/87, at 206.
[15] 403 U.S. 15 (1971).
[16] Transcript, 9/18/87, at 287.
[17] *Id.* at 288.
[18] *E.g. Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 778 F.2d 35 (D.C. Cir. 1985).
[19] *See Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986).

The overall picture presented by Judge Bork's free speech decisions and his writings on the subject belies the extravagant claim made by some of the proponents of this nomination that he is at the forefront of modern free speech jurisprudence. At best he is somewhere in the pack and running to catch up.

While the degree of inconsistency may be debated, the only purpose of this review of the past record is to aid in anticipating his approach to free speech questions in the future, if he is confirmed.

It is quite likely that in the future, some American will say, in a speech or a book or a television program or in some other medium, something that has nothing to do with the political process, but that nevertheless raises the ire of government. It is also likely that some speaker will advocate the disobedience of a law that he finds unjust, even if it is not in fact later found to be unconstitutional. It is equally likely that a future speaker will for whatever reason choose to express his views on political subjects in a manner that many others, perhaps almost all of us, find crude, shocking or offensive. And each of these events may well arise in a context of heated emotions, of social turmoil, even of crisis, when our deepest attachment to freedom of even unpopular speech is most sorely tested.

Our First Amendment forbids government censorship or reprisal against these speakers. In our constitutional system, that is a matter, in William Styron's words, of "conviction and faith." [20] The question before the Senate is the depth and strength of Judge Bork's attachment to these fundamental principles, which he so incisively criticized for years—and which he came to accept only recently.

Certainly, Judge Bork's forthright testimony before the Judiciary Committee makes this a close question. But in the end, I am not persuaded that Justice Bork would be an energetic and effective guardian of this most basic of our constitutional freedoms. Belated acceptance of these well established principles does not match what we expect of a Supreme Court Justice.

The second great constitutional theme which was explored in the hearings on Judge Bork's nomination is an issue of equality. The words of the Fourteenth Amendment to the Constitution are, once again, grand but general: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

The Judiciary Committee questioned Judge Bork extensively on his views on issues of racial equality, and of the powers of the courts and Congress to take steps to eradicate the racial discrimination that the Fourteenth Amendment was originally adopted to combat. To me, one of the most troubling aspects of Judge Bork's philosophy of equality under the Constitution is the application of this general language to a problem that modern Americans perceive in a far different light than was perceived by the authors of the Fourteenth Amendment: unfair governmental discrimination on the basis of gender.

The problem with Judge Bork's judicial philosophy in this area can be posed in simplistic terms: does he believe that the equal pro-

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[20] Transcript, 9/22/87, at 212.

tection clause applies to women? The answer is equally simplistic. Of course women are included within the phrase "any person," and therefore a law that discriminates on the basis of gender can be challenged under the equal protection clause.

The more difficult question is this: by what standard should a court evaluate a challenge to a law that discriminates between men and women? Is it comparable to a law that provides different tax rates for the sale of apples and oranges? That sort of distinction is almost never found to deny "equal protection of the laws." Or is the proper standard more like the scrutiny that will be given to a law which treats members of different races differently, a form of discrimination which is virtually never permitted under the Constitution?

The Supreme Court precedents on this subject are more recent than in the free speech area, but they establish an important principle. As eight of the nine Justices agreed in a 1980 decision, laws that treat men and women differently will be upheld only if they "serve important governmental objectives" and use "means . . . substantially related to the achievement of these objectives." [21] In other words, such laws are not always inconsistent with the Fourteenth Amendment, but they come into court with two strikes against them.

Judge Bork's statements on this issue prior to the hearing disagree with this approach. From 1971, when he wrote that "the Supreme Court has no principled way of saying which non-racial inequalities are impermissible," [22] to June 10, 1987, when he told an interviewer that he thought "the equal protection clause probably should have been kept to things like race and ethnicity," [23] there was no indication that Judge Bork supported or even accepted the recent attitude of judicial skepticism toward laws that embody sex discrimination. His record as a judge on the D.C. Circuit Court of Appeals sheds little light on the issue, since he has written only one opinion in a case involving the treatment of sex discrimination under the equal protection clause, and in that case his decision did not reach the merits of the claim.[24]

Judge Bork's testimony at the hearing fleshed out his approach to this question. He argued that the courts ought to ask the same questions of any statute challenged under the equal protection clause. A law that treats members of different groups differently would be sustained if there were a reasonable basis for the distinction, but would be struck down if a "reasonable basis" were lacking.[25] Judge Bork concluded that this approach "would arrive at . . . virtually all of the same results that the majority of the Supreme Court has arrived at," using the existing methods of equal protection analysis in sex discrimination cases. "There is really no difference," he testified, "except in the methodology." [26]

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[21] *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980).
[22] Indiana LJ, at 11.
[23] WorldNet Interview, at 12.
[24] *Cingrove v. Smith*, 697 F.2d 1125, 1134 (D.C. Cir. 1983) (Bork J., concurring in part and dissenting in part).
[25] Transcript, 9/17/87, at 28.
[26] *Id.*

It was reassuring to hear that Judge Bork would have reached the same result (though by a different route) as the Supreme Court has reached in striking down state laws that reflect unfounded stereotypes about the proper role of women in modern society. But once again, our focus on his attitudes toward past decisions is useful mainly as an element of predicting the course toward which he would guide the Supreme Court in the future if he is confirmed. Viewed in that light the nominee's testimony on equal protection issues raises some serious concerns. I will mention four here.

First, during the first century of litigation under the equal protection clause, the Supreme Court followed an approach to claims of sex discrimination that is disturbingly similar to the analysis Judge Bork presented to the Judiciary Committee. In case after case, the Supreme Court found it "reasonable" to bar women from certain professions and occupations, and otherwise to limit their opportunities compared to those available to men.[27] Accordingly, it upheld state laws reflecting a level of blatant discrimination that would be quite offensive to the ideals of equality that we as a society hold today. Indeed, the Supreme Court never struck down a law that treated men and women differently until 1971, when, not coincidentally, it began to abandon the "rational basis" standard for measuring such laws against the equal protection clause.[28] Perhaps it is mostly a matter of nomenclature, but Judge Bork's "reasonable basis" approach summons up unwelcome memories of the "bad old days" that are just as offensive to those concerned about women's rights as memories of the era of "separate but equal" are for people concerned about racial justice in our society.

The second problem is related to the first. To ask the Justices of the Supreme Court to decide, without further elaboration, what is "reasonable" discrimination is to invite a highly subjective decision. To use the facts of one celebrated case as an example, the Justices of the 19th Century decided that it was "reasonable" for the state of Illinois to forbid Myra Bradwell from practicing law because of her gender.[29] They reached that conclusion by using the same sort of unstructured, unpredictable analysis that Judge Bork says he would bring to the Supreme Court of the 21st Century. Ironically, this method of applying the general words of the Constitution to the particular facts before the Court smacks of the free-floating, "unprincipled" decisionmaking that Judge Bork has never ceased to criticize in Supreme Court precedents.

The unpredictability of this approach is a serious liability. This would be a concern not only to women who may wish to challenge laws that they believe are unfairly discriminatory. It would also be unfair to state the local governments, which every day consider actions that treat different groups of people differently because of gender or other factors. While the current state of the law may not provide as much predictability as these levels of government would like, it seems clearly preferable to a situation in which any distinction drawn by any government can be struck down whenever five members of the Supreme Court, for whatever subjective reason any

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[27] *E.g., Goesart v. Clery*, 335 U.S. 464 (1948); *Bradwell v. Illinois*, 83 U.S. 130 (1873).

[28] Statement of Sylvia A. Law, 9/25/87, at 5.

[29] *See Bradwell v. Illinois*, 83 U.S. 130 (1873).

of them might choose, decide that the distinction is "unreasonable."

The third problem with Judge Bork's "reasonable basis" approach to questions of constitutional equality can be illustrated by reference to one specific sex discrimination precedent which he has discussed both before and during the hearings. In 1976, the Supreme Court struck down a state law establishing a lower minimum drinking age for women than for men.[30] Judge Bork said about this case in an interview last June that "when the Supreme Court decided that (this distinction) violated the equal protection clause, I thought . . . that was to trivialize the Constitution and to spread it to areas it did not address."[31]

In response to questions from Senator DeConcini, Judge Bork commented as follows about this case:

> "I thought, as a matter of fact, the differential drinking age probably is justified . . . They had a lot of evidence about differential drinking patterns and resultant troubles, automobile accidents and so forth, upon which they based that differential."[32]

Although the nominee refrained from offering a final opinion on whether the case was properly decided, he said enough to raise another concern about his approach to the entire subject.

Whatever the Justices of the past thought was "reasonable," and whatever the Justices of the future might think is "reasonable," it is disturbing that Justice Bork might find "reasonable" a law that treats individual men and women differently based on overall statistical evidence about men and women as a whole. That approach does not bode well for a principle that lies close to the heart of our constitutional commitment to equality under law: that the contribution of every American citizen should be limited only by his or her own efforts, and not by generalizations about the gender or other group to which he or she belongs.

This raises a fourth problem with Judge Bork's newly articulated views on equal protection. Supreme Court precedents have established the axiom that laws that treat members of different races differently are almost never constitutional. But surely it is possible to make accurate statistical generalizations about different racial groups. Taken as a whole, black and white populations differ in life expectancy, for example, or in the prevalence of certain diseases. If such statistical generalizations are enough to establish a "reasonable basis" for a discriminatory law, then the prohibition against laws that make racial distinctions could logically be in jeopardy.

In the final analysis, what troubles me about Judge Bork's testimony on the issue of constitutional equality is not its inconsistency with his previous statements on the subject, although certainly some inconsistency exists. Rather, I am concerned about how a Justice with his judicial philosophy would respond to an ever more powerful and beneficial trend in American society: the drive to eliminate unfounded barriers to full participation in the society,

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[30] *Craig v. Boren*, 429 U.S. 190 (1976).
[31] WorldNet Interview, at 13.
[32] Transcript, 9/17/87, at 35–36.

not only be racial minorities and women, but by members of other groups disadvantaged by prejudice, ignorance, and superificial stereotyping.

We must ask ourselves what forms this trend will take in the constitutional controversies of the 21st Century. In a nation whose birth was announced with the proclamation of the "self-evident truth" that "all men are created equal," we can be sure that claims for a fuller and broader meaning of equality before the law will be pressed. Based on the record before the Senate, even including the new perspective provided by Judge Bork's own testimony, this nominee's conception of the equal protection clause is not broad and dynamic enough to reassure me that as a Justice of the Supreme Court, he will respond to these claims in the way the American people have a right to expect.

Our nation, in Abraham Lincoln's words, is not only "decided to the proposition that all men are created equal"; it was also "conceived in liberty." The ideal of liberty as embodied in our Constitutional provides the third theme for the Judiciary Committee's examination of Judge Bork's judicial philosophy.

As with freedom and equality, our Constitution speaks of liberty in the most general terms. The Fifth Amendment states that "no person shall . . . be deprived of . . . liberty . . . without due process of law." The Fourteenth Amendment directs a similar command to the States. As the Court applied this general language to a series of cases in our country's history it defined the meaning of the liberty our constitutional system was designed to protect.

These cases give lift to a powerful American ideal that is more implicit than explicit in the words of the Constitution. Perhaps the Ninth Amendment comes closest to expressing it: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But liberty is not just a group of rights; it is also an essential set of limitations on the power of government.

The Supreme Court's delineation of constitutional liberty may be found in an important series of 20th Century cases. These precedents recognize that in some aspects of the lives of individuals and families, the government has no legitimate power to intrude.[33] Government is fenced out of those parts of our lives. We sometimes refer to the doctrine these cases establish as the right to privacy, but Justice Louis Brandeis' famous phrase more accurately describes constitutional liberty: "the right to be let alone."[34]

These precedents do not draw the boundaries of our liberty with crystalline clarity. But they do identify points within the sphere of private and familiy decisionmaking where government must "let us alone."

It is fitting that, in a debate which leads to a referendum on the future of our constitutional ideals, most of the points of liberty identified by theses precedents concern our children. How shall we educate them?[35] What shall we teach them about our culture and

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[33] *E.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[34] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., Dissenting).

[35] *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

our heritage. [36] Shall we bring that heritage to life by having children live with their grandparents? [37] Shall we marry and have children at all, and if so, when? [38] Under our system, these are all decisions that, within certain limits, we are at liberty to make as we choose, without the unwanted intrusion of government.

These are also precisely the precedents which Judge Bork has most incisively and consistently criticized, for the very reason that they are not specifically rooted in the literal text of the Constitution. He has called these precedents "unprincipled," [39] "utterly specious," [40] "intellectually empty," [41] and even "unconstitutional." [42] This last criticism is part of Judge Bork's assertion that "nobody believes the Constitution allows, much less demands" some of these decisions, [43] which, in his words, "could not have been reached by interpretation of the Constitution." [44]

These statements from Judge Bork's speeches and articles, both before and after he became a judge, are not contradicted by his actions on the bench. In those rare cases in which constitutional privacy issues came before him, he has continued to criticize these precedents. [45] This is not improper, so long as he carried out his responsibility as a lower court judge to apply the precedents faithfully. While the testimony on this issue conflicts, I believe he has fulfilled that obligation as a U.S. Circuit Judge.

But Judge Bork's nomination to the Supreme Court requires the Senate to examine Judge Bork's philosophy of constitutional liberty in a different light. As a lower court judge, he is bound by precedent, even precedent he considers fundamentally illegitimate. As a Justice of the Supreme Court, he will have the power, and in some instances even the duty, to vote to overturn precedent that he believes the Constitution does not "allow, much less demand."

Thus, two issues of liberty are important in this nomination. First, what is Judge Bork's philosophy on this question? Have his views changed from those he has expressed with such consistency and forcefulness over the past decade and a half? Second, what does he think of the power of precedent for the Supreme Court? What consequences does his philosophy hold for the future of constitutional liberty?

The record on the first question is clear. Judge Bork's views on the role of the Supreme Court in defining constitutional liberty have not changed in any substantial degree.

His testimony on this subject did clear away some underbrush that might obscure the main issue. He emphasized the distinction between his personal views and his conception of the commands of the Constitution. For example, the Connecticut law which the Supreme Court struck down in the 1965 case of *Griswold* v. *Connecti-*

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[36] *See Meyer v. Nebraska*, 262 U.S. 390 (1923).
[37] *See Moore v. East Cleveland*, 431 U.S. 494 (1977).
[38] *See Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 107 S.Ct. 2254 (1987).
[39] Indiana LJ, at 4.
[40] *Id.* at 9.
[41] *Id.* at 11.
[42] Bork Testimony on Human Life Bill, Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess. 310 (1981).
[43] *Id.* at 315.
[44] Bork Speech at Catholic University, 3/31/82, at 4.
[45] *E.g., Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

cut made it a crime for a married couple to use contraceptives. Judge Bork reiterated his conviction that this was a "silly" or a "nutty" law [46]; but as he told me in response to a question at the hearing, "Merely the fact that it is a dumb law gives the Court no additional power because there is no statement in the Constitution that no state shall make a dumb law." [47]

Judge Bork also emphasized that he was criticizing *Griswold* and other precedents for the reasoning employed by the courts, and not necessarily for the results reached. Perhaps the same result could be reached by another route. As he told the Committee with respect to *Griswold*, "I have never tried to find a rationale and I have not been offered one. Maybe somebody would offer me one." [48]

Neither of these points reflect any significant change in Judge Bork's judicial philosophy. I never thought that Judge Bork's personal views on the statute struck down in *Griswold*, or indeed any similar policy matter, have any relevance to the merits of his nomination. His personal views on contraception are immaterial.

And the distinction between rationale and result is not particularly meaningful. The result of *Griswold* is history, and the flow of history has left that particular "nutty" statute stranded on a shoal of the past. What is most important for the future is the rationale of the decision, and how it will be applied, expanded, or rejected when the next case, and the next and the next, inevitably come along.

Judge Bork still challenges the legitimacy of *Griswold* and all the other cases defining a constitutional right of privacy. He testified, "If I decide that I am going to protect liberty . . . I have to define it without guidance from the Constitution—what liberties people ought to have and what liberties they ought not to have . . . I became convinced that it was an utterly subjective enterprise . . . I do not want judges, including me, going around, saying, 'You have this liberty, you do not have that liberty. . . .' " [49]

Judge Bork continues to maintain, with fervor and force, that the Supreme Court cannot give real content to the general concept of constitutional liberty, as contrasted with the specific guarantees of the Bill of Rights and other constitutional provisions. Judge Bork continues to defend an isolated position.

One knowledgeable witness before the Judiciary Committee asserted that "not one of the 105 past and present Justices of the Supreme Court has ever taken a view as consistently radical as Judge Bork's on the concept of 'liberty'—or the lack of it—underlying the Constitution." [50] Whether or not that is so, it is certainly true that in modern times the Justices have virtually without exception agreed that "liberty" is something more than observance of the specific limitations on government that are literally spelled out in the Bill of Rights. They arrived at this conclusion by a variety of routes, and applied it differently in different cases. But I do not know of any who would accept the proposition that the liberty of

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[46] Transcript, 9/16/87, at 49, reiterating Bork Interview for Newsweek, 9/14/87, at 36.
[47] Transcript, 9/18/87, at 293.
[48] Transcript, 9/15/87, at 136.
[49] Transcript, 9/18/87, at 227–28.
[50] Statement of Laurence Tribe, 9/22/87, at 14.

Americans and their families goes only as far as the words of the first eight amendments to the Constitution, and no further. Indeed, I think the American people would find that narrow concept of their liberty profoundly disturbing.

What Judge Bork derides as an "utterly subjective enterprise" is what most of us would call the process of wise judgment. The role of a Justice of the Supreme Court in these cases is to draw lines, to shape contours, and then to tell government, "This far you may go, but no further, into the private lives of the citizenry." To draw those lines requires a keen intellect, a deep understanding of history, a sense of justice, and that undefinable mixture of prudence and boldness we call good judgment. The issue for the future, and hence for this nomination, is not whether Judge Bork has those qualities, but whether he is philosophically committed to exercising them on behalf of the ideal of liberty so central to our constitutional system.

The question, then, is how a Justice Bork would use this rich history of the ongoing development of our constitutional liberties. Would he approach it as a conservative: conserve what is best in the precedents and build upon it to decide future clashes beween the demands of the government and the rights of the individual? Or would he take the activist approach of seeking to eradicate from our jurisprudence this chain of decisions that he still believes are profoundly misguided?

These are not questions to which Judge Bork's prior record gives us a definitive answer. After all, he has never before had any of the power—and will not unless the Senate confirms him—either to conserve or to reject the constitutional precedents of the Supreme Court. And the testimony of the nominee before the Judiciary Committee does not provide the definitive answer.

In my last opportunity to question Judge Bork at the hearings, I discussed with him this question of the power of precedent. I noted that earlier in the hearing he gave some examples of constitutional doctrines that were firmly embedded in our law. Judge Bork said then that regardless of whether these decisions were right or wrong, they "are now part of our law, and whatever theoretical challenges might be levelled at them, it is simply too late for any judge to try to tear it up, too late for a judge to overrule them." [51]

Judge Bork's list of these firmly settled doctrines—of precedents he would respect even if he disagreed with them—was short but significant. It included the expansive interpretation of the federal government's power to regulate interstate commerce. It included the legal tender cases, authorizing the printing of paper money. It included the expansion of the equal protection clause to cover gender discrimination. It even included the free speech precedents culminating in *Brandenburg* v. *Ohio*, which until the hearing he had never publicly accepted as settled law.[52]

I then asked Judge Bork about the most salient cases involving the constitutional liberty of the American people: "the cases based on a constitutional right to privacy in matters relating to procreation, child rearing and the like." I asked him whether he would in-

[51] Transcript, 9/18/87, at 46.
[52] *Id.* at 289–90.

clude these decisions in his list of precedents that, right or wrong, were so firmly embedded in our law, and in the way we as Americans think about out rights, that "it is too late for the Supreme Court to tear them up."

Judge Bork replied as follows: "Senator, I have, I think, rather consistently testified that I am not going to answer that question because that is a highly controversial matter." [53] He continued that if a right to privacy could not be more firmly rooted in the Constitution, he would have to consider "whether this is the kind of case that should be overruled. And I have listed the factors that one would consider in deciding whether a case should be overruled. And I cannot go any further than that." [54]

I do not criticize Judge Bork's reticence in answering my question. The purpose of a confirmation hearing for a Supreme Court Justice is not to extract commitments, but to exercise judgment about what the nominee is likely to do or not do if confirmed.

But Judge Bork's response does create a distinction. He already gave something resembling a commitment in response to another question. He said it was "too late to overrule" either the leading free speech cases or the cases addressing sex discrimination under the equal protection clause, even though he had consistently criticized those doctrines for years prior to the hearing. For Judge Bork, the cases defining a constitutional right to privacy and—even today—different.

On the issue of liberty, then, as contrasted with the questions of freedom and equality, Judge Bork did not accept the precedents. Nor did he assure us that he would reach the same result by a different route. Evidently, he continues to believe that by identifying a constitutional right to marital and family privacy the Supreme Court is not only taking the wrong path, but wandering off the path entirely, far from the signposts that can be read in the words of our Constitution.

This is what we know about Judge Bork's past views and his present thinking on the issue of liberty. But once again, our focus must be on the future.

The task of defining our liberties—of deciding where government must stay its hand, and the individual be left free to make his or her own wise or foolish choices—is one of the most difficult tasks of interpreting the Constitution. History tells us that the decisions that the Supreme Court makes in the name of liberty are not always wise ones. Even today, there is much that any thoughful American can disagree with in this line of precedent. But if the Supreme Court were to shirk the duty of making these decisions, of drawing these lines to define the spheres of government power and individual rights, the results would be chilling—chilling for the American people to contemplate.

Government power and individual rights will continue to collide as we approach the new century. Technology will give government an ever greater capacity to intrude into our homes, our families even our bedrooms. And if we doubt whether government will ever

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[53] *Id.* at 291
[54] *Id.*

be tempted to realize this potential for intrusion, we ignore the implications of today's headlines and the lessons of history.

When a majority of the community, acting through its elected representatives, oversteps its legitimate bounds, the results, in retrospect, sometimes seem amusing, trivial, even "nutty." But that does not mean that the majority will never repeat such mistakes. To the contrary, history teaches us that under the pressure of pubic turmoil or panic, the majority will in the future, as it has in the past, sometimes seek to channel the force of government into collision with the rights of the individual. It may do so with the best of motives, with the most plausible of reasons, and with overwhelming popular support. Where then can the individual turn for protection of a fundamental liberty, the right "to be let alone"?

History gives us the answer. The individual will seek to vindicate his liberty in the same forum to which black Americans turned when the majority refused to hear that separate is inherently unequal. It is the same forum to which disenfranchised voters turned when legislative majorities refused to heed the call for "one person, one vote." The future defenders of liberty will turn to the courts, the institution that must stand, in James Madison's phrase, as "an impenetrable bulwark" to protect our liberties against a powerful government with majority support.

If the government action violates a specific guarantee of the Bill of Rights, the courts have a duty to put and end to it. But if the right involved is not specifically listed in the Constitution, but instead emerges from our shared ideals of liberty, then it is equally important that the courts vindicate it, not, in the words of the Ninth Amendment, "deny or disparage" it.

This is the ideal that the American people hold of the Supreme Court as the guardian, not only of their specifically enumerated freedoms, but also of the liberties that they have never surrendered to the government. But as I understand the record before the Senate, this is not the concept of constitutional liberty that Judge Bork holds.

We cannot know the specific challenges to liberty that will confront us and our children in the years ahead. But we can foresee that new and complex developments in our society—genetic engineering and other new technologies, threats of terrorism, epidemics of disease and panic, the name only a few—will spawn difficult and important controversies. Those cases will test, more forcefully then ever before, our commitment to limited government and to the "right to be let alone." That commitment is embodied in the specific words of the Constitution. But it can also be found in the tradition of a Supreme Court that accepts the responsibility to give real meaning to the ideal of liberty.

Judge Bork has often said that American law lacks theory; it only has a tradition.[55] That tradition may be uneven and inconsistent. Its structure may be blurred, not sharply drawn. But if the Supreme Court is faithful to that tradition, it can continue to be a powerful safeguard against the threats to liberty that may confront the court in the decades ahead. The Justices of the Supreme Court

[55] Indiana LJ, at 1; Bork, "Tradition and Morality in Constitutional Law," at 10 (AEI 1984); Bork Speech at West Point, 4/9/85, at 12.

must be true to that tradition. I am not confident that Judge Bork can meet that test.

The extensive hearings on the nomination of Judge Bork examined in depth many other issues besides the three discussed here. The testimony we heard from dozens of accomplished public servants, legal scholars, historians, and other citizens was useful and thought-provoking.

I gave careful consideration to the testimony of former President Ford, former Chief Justice Burger, and former counsel to the President Lloyd Cutler. The essence of their testimony is that Judge Bork's philosophy poses no realistic threat to our constitutional ideals of freedom, equality and liberty. These distinguished Americans, and other supporters of this nomination, argue that the concept of the Consitution that this nominee would bring to the Supreme Court will strengthen its capacity to apply these values to the unknown cases and controversies of the future.

The witnesses on either side of this controversy may speak the language of certainty. But the real issue before us is one of probabilities and of risk. Many thoughful and distinguished Americans have shared their versions of the future with us. But our duty is not to align with witnesses, however prestigious, who vouch for or against the nominee. Each Senator brings to this nomination what we know of Judge Bork's past record and recent testimony, but the question which we all seek to answer concerns the future. The task is for each Senator to make an independent judgement about how the confirmation of Judge Bork is likely to shape the rights, the hopes and the dreams of today's Americans, and of our children who will live most of their lives in the 21st Century.

As we vote on this nomination, we mut respond to the recommendation of the President. But we must answer, not to him, but to the people.

We must answer to the author, the artist, the orator, who draw creative sustenance from freedom of speech.

We must answer to the women who ask nothing more than the chance to compete equally in contributing to the wealth and well-being of our society.

We must answer to parents of every race and creed who dream of a better life for their children.

We must answer to the families who willingly respond to the just claims of government, but who understand that they and their children are not creatures of the state, and that some decisions are too intimate and important to leave to government.

We must answer to every American who recognizes that the majority may rule, but the majority is not always right.

I have made my judgment, and I am prepared to be accountable to my fellow Vermonters for it. I conclude that the confirmation of Judge Bork to the Supreme Court poses too great a risk for the future of the ideals—freedom, equality, and liberty—that "we the people" have embodied in our Constitution. This judgement is a prediction, not a fact, and if Judge Bork is confirmed I may be proven wrong. But after studying the massive record before the Committee, I believe that my judgment is correct.

Accordingly, I recommend against the confirmation of Judge Bork.

ADDITIONAL VIEWS OF SENATOR HEFLIN

While I am in agreement with most of the language in the Committee Report on the nomination of Robert Heron Bork, I believe that the statement I made on October 6, 1987, prior to the committee vote is a more accurate reflection of my views on this nomination. Thus, I submit my statement as additional concurring views to the majority report.

In my opening statement some three weeks ago, I labeled the Supreme Court as the actual "People's Court." On an every day basis, the Supreme Court of the United States deals with real people, their basic human rights, and liberties.

It determines the rights of individuals—to be secure in their homes and thoroughfares—to own property—to vote— to be left alone in normal intimate settings—to the due process of law and the equal application of laws. It further determines the rights of people as a whole to law and order.

I outlined in my opening remarks the arguments, pro and con, about the nominee. I stated, among other things:

> We are told by some that Judge Bork will strictly construe the Constitution—eschewing activism, and interpreting the law, not substituting his personal opinion for what the law should be.
>
> We are told by others that Judge Bork is an extremist, an ideologue of the first order, a legal zealot who will use his position on the Court to advance a far right radical judicial agenda.

If Judge Bork is a true conservative who guards against activism, our now fundamental precepts of a fair and just society, which include people's rights, will be protected. On the other hand, if he is an extremist, whose concept of the Constitution calls for the reversal of decisions dealing with human rights and individual liberties, then people's rights will be threatened.

As the hearings have proceeded, I have endeavored to find an answer. Frankly, I would favor a conservative appointment on the Court. I have supported the three (3) appointments that President Reagan has made on the Supreme Court. In fact, I have supported all but two (2) of the 325 nominations to the federal bench made by President Reagan, because I felt they would, in most instances, become good conservative and impartial jurists. But, on the other hand, I don't want an extremist on the United States Supreme Court.

There is little question that Judge Bork is a jurist of outstanding intellect and qualifications. He is indeed an erudite scholar. His credentials and experience are unsurpassed. However, whether he is an extremist is a more difficult question to answer.

In order to determine the issue of extremism, these hearings have focused on the writings, opinions, and statements of Judge Bork as they relate to people's rights.

Judge Bork's early writings in law reviews, law journals, political periodicals, and other publications reveal extremism on a number of issues. However, he has on occasions renounced many of these early judicial extremist beliefs. His oral statements in these confirmation hearings indicate that he has changed many of these extremist views and become a conservative in the thalweg of judicial movement. Yet, many have questioned these oral renouncements as merely a confirmation conversion and lacking permanent sincerity.

I am also troubled by the absence of writings or prepared speeches which recite a change in his earlier views and the reasons for such change.

My concerns were not reduced by speeches made in the year 1987 before he was nominated. In a speech in January of this year to the Federalist Society, Judge Bork stated:

> Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy.

I have read and reread his speech to the Philadelphia Society which some have labeled "Bork's Wave Theory of Law Reform" made in April of 1987, approximately three months bedore he was nominated. Parts of the speech reflect conservative thought, but portions of that speech read like a speech of an extremist with an agenda. While it was an after-dinner speech, nevertheless, it was a carefully prepared fifteen-page address that can leave a person with the impression that he is advocating a movement to sweep the debris of nonoriginalist decisions of the Supreme Court off the books and out to sea. On the other hand, it is subject to a milder interpretation.

The history of Judge Bork's life and life-style indicates a fondness for the unusual, the unconventional, and the strange. It has been said that he is either an evolving individual with an insatiable intellectual curiosity for the unique, the unknown, the different, and the strange or, on the other hand, that he is an extremist with a propensity toward radicalism. His history as a young man reveals that he was first an avowed socialist—that he gave considerable attention to becoming a marxist—then he returned to socialism—after which he moved toward libertarianism. As he grew older, he became next a "New Deal liberal"—and then evolved to a strict constructionist—and more recently he has been a self-proclaimed "originalist." It now appears from his oral declarations at these hearings that he has turned another corner and is moving back towards the center.

I am in a state of quandry as to whether this nominee would be a conservative justice who would safeguard the living Constitution and prevent judicial activism or whether, on the other hand, he would be an extremist who would use his position on the Court to Advance a far-right, radical, judicial agenda.

The question is difficult. Frankly, I am not sure that I have the answer. I am reminded of an old saying, "when in doubt, don't." I see a great deal of wisdom to this warning. A life-time position on the Supreme Court is too important to risk to a person who has continued to exhibit—and may still possess—a proclivity for extremism in spite of confirmation protestations.

Because of my doubts at this time and at this posture of the confirmation process, I must vote no.

ADDITIONAL VIEWS OF SENATOR SPECTER

I am writing separately to express my reasons for opposing this nomination.

I shall vote against Judge Bork on confirmation to the U.S. Supreme Court because I believe there is substantial doubt as to how he would apply fundamental principles of constitutional law. This is a difficult vote since I will be opposing my President, my party and a man of powerful intellect whom I respect and like. I have spent hours discussing my concerns with Judge Bork both publicly at the hearings and privately in my office with the last meeting for more than an hour yesterday afternoon.

This vote is especially hard since I know I will be disappointing many constituents who feel so strongly in favor of Judge Bork although there are about as many with equally strong feelings in opposition. At the end, politics and personalities must give way, for me, to my own judgment on the history and the future of the Constitution.

Constitutional separation of power is at its apex when the President nominates and the Senate consents or not for Supreme Court appointees who have the final word. The Constitution mandates that a senator's judgment be separate and independent.

My judgment on Judge Bork is based on the totality of his record with emphasis on how he would be likely to apply traditional constitutional principles on equal protection of the law and freedom of speech.

I am troubled by his writings that unless there is adherence to original intent, there is no judicial legitimacy; and without such legitimacy, there can be no judicial review. This approach could jeopardize the most fundamental principle of U.S. Constitutional law—the supremacy of judicial review—when Judge Bork concedes original intent is so hard to find and major public figures contend that the Supreme Court does not have the last word on the Constitution.

I am further concerned by his insistence on Madisonian majoritarianism in the absence of an explicit constitutional right to limit legislative action. Conservative justices have traditionally protected individual and minority rights without a specifically enumerated right or proof of original intent where there are fundamental values rooted in the tradition of our people.

Thirty-three years after the fact, there is still no acceptable rationale for the desegregation of the schools in the District of Columbia according to Judge Bork's doctrine of original intent. It is not only that the majority in a democracy can take care of itself while individuals and minorities often cannot, but rather that our history has demonstrated the majority benefits when equality enables minorities to become a part of the ever-expanding majority.

These conceptual concerns might be brushed aside if it were not for his repeated and recent rejection of fundamental constitutional doctrines. Over the years, Judge Bork has insisted that equal protection applies only to race as originally intended by the Framers. As recently as one month before his nomination, he said equal protection should have been kept to things like race and ethnicity. His view of the law is at sharp variance with more than a century of Supreme Court decisions which have applied equal protection to women, aliens, illegitimates, indigents and others.

For the first time at his confirmation hearings, Judge Bork said he would apply equal protection broadly in accordance with the Court's settled doctrine under Justice Steven's reasonable basis standard. Without commenting on the various technical levels of scrutiny, I have substantial doubt about Judge Bork's application of this fundamental legal principle where he has over the years disagreed with the scope of coverage and has a settled philosophy that constitutional rights do not exist unless specified or are within original intent.

Similarly, Judge Bork had, prior to his hearings, consistently rejected the "clear and present danger" test for freedom of speech even though a unanimous Supreme Court had accepted it as an ingrained American value for years. Justice Holmes' famous dictum that "time has upset many fighting faiths," expressed the core American value to listen to others and permit the best ideas to triumph in the marketplace of free speech, short of a clear and present danger of imminent violence.

At the hearings, I asked Judge Bork about his position that Justice Holmes had a "fundamentally wrong interpretation of the First Amendment." After extended discussion, Judge Bork said for the first time he would accept the doctrine as settled and apply it although he still disagreed with the underlying philosophy. I have substantial doubt about Judge Bork's application of that standard to future cases involving different fact situations where he retains his deep-seated philosophical objections.

In raising these doubts about Judge Bork's application of settled law on equal protection and freedom of speech, it is not a matter of questioning his credibility or integrity, which I unhesitatingly accept, or his sincerity in insisting that he will not be disgraced in history by acting contrary to his sworn testimony, but rather the doubts persist as to his judicial disposition in applying principles of law which he has so long decried.

These concerns and doubts lead me, albeit with great reluctance, to vote against Judge Bork.

OCTOBER 1, 1987.

MINORITY VIEWS

INTRODUCTION

The hearings on Judge Bork were some of the most far-ranging, probing, and exhaustive ever undertaken by the Committee. The nominee was the most open and forthright to appear before the Committee. The hearings focused on several basic areas: the qualifications of the nominee; the nominee's view of the Constitution; the nominee's view of the role of the judiciary; the nominee's views on specific issues such as civil rights, the right of privacy; First Amendment rights, antitrust issues, and criminal law issues; his view of precedents; and his role in dismissing Watergate special prosecutor Archibald Cox. In each instance, Judge Bork's record and thoughtful responses place him well within the conservative mainstream of American jurisprudence.

As for qualifications, no one seriously questions that Judge Bork is eminently qualified by virtue of his ability, integrity and experience. Therefore, opponents attacked Judge Bork in other areas, such as his view of the judiciary's role in our democracy. However, Judge Bork's belief that judges should merely interpret, and not make, law is clearly the accepted view of most Americans. Additionally, Judge Bork's understanding of Constitutional principles of limited federal power is both intellectually honest and comports with historical and contemporary analysis of this great document.

The major criticisms leveled at Judge Bork are the result of misunderstandings by his critics: First, a misunderstanding of the difference between the role of a professor and that of a judge, and second, a misunderstanding of Judge Bork's position on substantive issues. Despite sloganeering and misrepresentations to the contrary, Judge Bork is well within the judicial mainstream on such issues as individual liberties, civil rights, the First Amendment, criminal law issues, antitrust matters, and the value of precedent.

Along with a vast number of judges and legal scholars, Judge Bork disapproves of a Court-created generalized "right of privacy." What this means is that Judge Bork does not believe that judges are free, at their whims, to create new "rights." His view that Constitutional rights must have a basis in the Constitution is being portrayed by some as extremism, as an unpredictable philosophy. In reality, Judge Bork's comprehensive theory of jurisprudence is firmly based in our judicial history, and is at least as predictable as any other judicial philosophy, and certainly more so than one which strains to "create" new rights.

Despite a unanimous Senate confirmation to serve as Court of Appeals Judge since Watergate, some opponents tried to rekindle

controversy over Judge Bork's role in dismissing Archibald Cox. Testimony by Former Attorney General Elliott Richardson should now put this issue to rest forever. Additionally, egregious misrepresentations of specific decisions or comments by Judge Bork have been promoted and repeated by his opponents. It takes very little to create an incorrect perception, but tedious work to set the record straight; that explains the lengthy discussions which follows in these views.

Judge Bork has proved to be a forceful intellect, and a man of unquestioned integrity. He is the victim of the misunderstandings of his critics, who confused the roles of Robert Bork as a legal commentator and Robert Bork, the Judge; critics who do not truly understanding his substantive positions, and who launched an aggressive public relations campaign based on what they thought to be Judge Bork's views. In reality, Judge Bork has excelled at all experiences an attorney can have: as private practitioner, as a law professor, as a government lawyer, and as a judge. An objective review of this nominee and his record must lead one to concur with the assessment of Chief Justice Burger who said that in the past 50 years no nominee to the Supreme Court has "had better qualifications."

A. Qualifications

Judge Robert Heron Bork is among the most qualified nominees to the Supreme Court in recent history. Former Chief Justice Warren Burger said Judge Bork is one of the best qualified candidates for the Supreme Court in 50 years. Robert Bork was born on March 1, 1927 in Pittsburgh, Pennsylvania and attended elementary and high school there. He attended the University of Pittsburgh for a short time in 1944 and volunteered to serve in the United States Marine Corps in 1945 and served until 1946. He reentered the Marine Corps in 1950, serving until 1952, when he was honorably discharged.

In between his tours of duty, he received a Bachelor of Arts degree from the University of Chicago in 1948 and he was elected to Phi Beta Kappa. Subsequently he began his studies at the University of Chicago Law School. He received his J.D. in 1953, having served as the managing editor of the Law Review. He was also elected to Order of the Coif, a national honor society. In 1953, he was employed as a research associate at the Law and Economics Project of the University of Chicago Law School where he worked with Professor Aaron Director. In 1954 he joined the New York law firm of Wilkie, Owen, Farr, Gallagher & Walton. In 1955 he became an associate at Kirkland, Ellis, Hodson, Chaffetz & Masters in Chicago, Illinois, where he practiced law until 1962.

Shorty after becoming a partner at that firm, he left to teach at Yale Law School and was named a Professor in 1965. In 1973, he was nominated to serve as Solicitor General of the United States in the Department of Justice and was unanimously confirmed by the Senate. He rendered distinguished service in that position until 1977, when he returned to Yale Law School, where he occupied two endowed chairs: first was that of Chancellor Kent Professor of Law from 1977 through 1979, and then that of Alexander Bickel Professor of Public Law from 1979 to 1981.

Judge Bork returned to Washington, D.C. and Kirkland & Ellis in 1981, where he was a practicing partner for 1 year. In 1982 President Reagan nominated him to be a Judge on the U.S. Court of Appeals for the District of Columbia Circuit. He was confirmed unanimously by the full Senate and has served with distinction since that time

As former President Gerald R. Ford stated during his introduction of Judge Bork,

> There are four kinds of occupations that a lawyer can have: private practitioner, law professor, government lawyer, and judge. Robert Bork has distinguished himself in not one, but in all four endeavors. A renowned Federal Appeals Court Judge, former Solicitor General of the

United States, professor of law at Yale University, and twice a partner in one of the Nation's leading law firms.

Judge Robert Bork is uniquely qualified to sit on the United States Supreme Court.

There is virtual unanimity among the members of the Committee and all witnesses that Judge Bork excelled with respect to all the criteria normally considered in evaluating a nominee to the Supreme Court: judicial integrity, judicial temperament, and judicial competence.[1] For example, former Secretary of Transportation William Coleman, who testified against Judge Bork's nomination, stated:

Mr. Coleman: As a judge on that court [of Appeals], his opinions are good opinions. . . .

Senator Hatch: Okay. Now in 1981, you also agreed that Judge Bork met the highest standards of professional integrity, is that correct?

Mr. Coleman: Yes.

Senator Hatch: And do you know of any event since 1981 which would cast doubt on Judge Bork's highest standards of professional integrity?

Mr. Coleman: I know of none, and more important, I heard the Chairman of this Committee, on Saturday he said that he had looked through the FBI report, and there was nothing in which would in any way cast doubt on his integrity.

Later, Mr. Coleman remarked, "I have no doubt about his professional competence," and "I have no question about his judicial temperament."

Congresswoman Barbara Jordan said, "I concede Judge Bork's scholarship and intellect and its quality, and there is no need for us to debate that."

Professor Burke Marshall of Yale Law School said: "I am sure that Judge Bork is an intelligent and skilled lawyer, and he is an intelligent and skilled judge so far as I know."

Former Attorney General Nicholas deB. Katzenbach said: "[Judge Bork] is learned in the profession, far more learned than I, perhaps even more learned than some Members of this Committee." He concluded by saying, "I do respect Judge Bork enormously, and I want that made clear."

Professor Laurence Tribe of Harvard Law School said: "I have very high regard for Judge Bork's intellect, and I have no reason to doubt his integrity." Professor Tribe also had the following colloquy with Senator Simpson:

Senator Simpson: . . . Five and a half years of writing opinions on that Court and not one person yet has come in and said that any of those opinions are out of the mainstream. Is not that fascinating? Is not that fascinating? Not one.

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[1] The Evaluation Criteria of the American Bar Association's Standing Committee on the Federal Judiciary states: "The Committee's evaluation of the prospective nominees to these courts is directed primarily to professional qualifications, that is competence, integrity and judicial temperament."

> Mr. Tribe: I do not think it is—with all respect, to be honest—I do not think it is that fascinating, because I have never doubted, nor has anyone else, Judge Bork's really fine intellect and his capacity to write fine opinions that will not be reversed by the Supreme Court.

In response to questioning about the importance of Judge Bork's record of never being reversed by the Supreme Court, Professor Tribe said:

> These cases show that Judge Bork professionally is capable of writing a fine opinion on matters that relate to statutory interpretation . . . [O]n the whole, when they address matters of statutory interpretation, they are very well done. It would be unfair to Judge Bork to say that you could just pull them out of a bottle, and they they do not tell you anything about his intellect; they do.

Professor Cass Sunstein of Harvard admitted that "[i]f you use integrity and professional competence, I do not think it would be possible to have concerns about Judge Bork on those scores. He is a first-rate lawyer."

Praise for Judge Bork's integrity, competence and intellect was shared by professors from both law schools and universities throughout the country. For example, the historian, Professor William Leuchtenberg of the University of North Carolina said: "Anyone who heard him in Philadelphia or who witnesse[d] his performance here this past week would acknowledge that he is an able man who articulates his views with uncommon force; and to deny that would be unfair to the nominee."

Professor Walter Dellinger of Duke Law School similarly praised Judge Bork, calling himself "an admirer of his." Continuing, he said "I think he has added greatly to the intellectual discourse of our time by his challenges."

Professor Philip Kurland of the University of Chicago Law School described Judge Bork as "a constitutional scholar of some distinction," and said, "Had I been called here as a character witness, I should gladly tell you of his impeccable character."

Professor Herma Hill Kay, speaking on behalf of her panel, added, "I'd just like to say that all of us as law professors always have to judge our graduates on their intellectual prowess, and I think on that measure as you've said, Judge Bork is clearly an intellectual strength." And Dean Robert Pitofsky acknowledged that "it has been said that Judge Bork is a bold and brilliant scholar—which is true, in my opinion—and that he has been influential in molding the antitrust policy of the 1980's, which is also true." Dean Lee Bollinger of the Michigan Law School remarked that Judge Bork "had displayed judicial competence that would justify an appointment to the Supreme Court."

Practicing lawyers remarked about Judge Bork's outstanding qualifications. The President of the Association of the Bar of the City of New York, Robert Kaufman, said "the quality of Judge Bork's intellect and professional experience is not in dispute . . . ." Chesterfield Smith, past president of the American Bar Association, called Judge Bork "a brilliant jurist and lawyer,

and I respect his intellectual qualifications without reservation." Vilma Martinez of Los Angeles said,

> Judge Bork, in his public statements and his writings, shows us a man who has a keen intellect and a knowledge of legal precedent and who attacks complex legal problems as the grand master attacks a chess board.

Even members of the Committee who are opposed to Judge Bork's confirmation acknowledged Judge Bork's fitness for the Supreme Court. For example, the Chairman told Judge Bork that "you are an honorable and decent man. There is nothing in your background that I have seen that in any way indicates that you are not, in terms of character, fit to serve on any court in any position in this country." He also called Judge Bork a "very bright man," who is "principled."

Senator Leahy noted that Judge Bork "is an intellectual, of the first order. He is a thinker; he is a philosopher." The Senator from Vermont later noted that he is a "distinguished legal philosopher."

Those who support this nomination are even stronger in their praise for Judge Bork. Those who testified on his behalf include former President Ford and former Chief Justice Burger. Seven former Attorneys General supported his nomination, six of them testifying before the Committee. Many highly respected academics, former colleagues and members of the bar testified on his behalf. In addition, Justice John Paul Stevens took this unusual step of publicly endorsing Judge Bork's elevation to the Supreme Court. There are many statements of praise for Judge Bork which reveal the truth of former Chief Justice Burger's statement—that Judge Bork is one of the best qualified candidates for the Supreme Court in 50 years.

The former Chief Justice added, "the man is thoroughly qualified on every count that I would consider if I were sitting as a Senator." Former Attorney General William French Smith called Judge Bork "a highly distinguished, fair-minded jurist and scholar of the highest professional integrity," with "all the earmarks of a great Supreme Court Justice," and said "there is no one better—qualified to sit on the Supreme Court." Former Attorney General Edward Levi, who has known Judge Bork for almost 40 years, said:

> In my experience with him, I would say that Judge Bork is an able person of honor, kindness, and fairness, and I would say with practical wisdom, which he has shown as an outstanding Solicitor General, and an outstanding and eloquent judge, and for the sake of our country, I very much hope he will be confirmed.

Former Attorney General William P. Rogers said that "[c]ertainly, [he] could think of no nominees during [his] professional life who has been better qualified."

Judge Griffin Bell, former Attorney General during the Carter administration was among a number of prominent Democrats voicing support for Judge Bork, delaring that "if [he] were in the Senate [he] would vote for" Judge Bork. He said, "I like to see a man go to the Court who is going to be his own judge, be his own man, and I think that is the way it is going to turn out." Former

White House Counsel Lloyd Cutler testified on behalf of Judge Bork's nomination and gave his view that:

> On the whole, I think he would come much closer as a sitting Justice if he is confirmed to a Justice like Justice Powell and Justice Stevens—and I remind you that that is precisely what Justice Stevens himself said, that "you will find in Judge Bork's opinions a philosophy similar to that you will see in the opinions of Justice Stewart, Justice Powell, and some of the things that I . . . have written."

Some of the respected academics testifying on his behalf had the following things to say about Judge Bork: "[T]he country will be better off with Robert Bork on the Supreme Court than without him because he is a person of surpassing intellectual distinction, because of his outstanding integrity and intellectual honesty, and because of his commitment to the rule of law." (Professor Paul Bator, University of Chicago Law School.) "In my view no more than a score of persons has ever been nominated to the Supreme Court with such surpassing credentials." (Professor Henry Monagahan, Columbia University School of Law); and, "He is a man of integrity who has adhered to the highest standards of the legal profession." (Dean Dallin Oaks, Brigham Young University Law School.)

As noted above, these are but some of the comments attesting to Judge Bork's qualifications by both supporters and opponents of his nomination. This selection should establish what is agreed upon by most: Judge Bork is qualified on all counts to be an Associate Justice on the Supreme Court.

B. ABA Rating

Judge Bork also received the highest rating for a Supreme Court Justice given by the American Bar Association's (the "A.B.A.") Standing Committee on Federal Judiciary (the "Committee"), "Well Qualified." This rating, in the Committee's words, "is reserved for those who meet the highest standards of professional competence, judicial temperament and integrity. The persons in this category must be among the best available for appointment for the Supreme Court." As the statements set forth in the immediately-preceding section conclusively demonstrate, there should be no question that from the perspective of both his supporters and detractors, Judge Bork is fully deserving of the highest rating awarded by the American Bar Association.

Additionally, the A.B.A. also gave Judge Bork its highest rating in 1981, when it first evaluated Judge Bork for a position on the Court of Appeals for the District of Columbia Circuit. The A.B.A. then evaluated him as "Exceptionally Well Qualified," a rating rarely accorded to nominees to the bench. To receive that rating, according to the A.B.A.:

> the prospective nominee must stand at the top of the legal profession in the community involved and have outstanding legal ability, wide experience and the highest reputation for integrity and temperament. In addition to preeminence in the law, the prospective nominee should have a reputation as an outstanding citizen, having made impor-

tant community and professional contributions in order to meet the sparingly awarded "Exceptionally Well Qualified" evaluation.[2]

The determination that Judge Bork met these incredibly high standards and was deserving of the "Exceptionally Well Qualified" rating was made by an A.B.A. Committee based on an investigation conducted by former Secretary of Transportation William Coleman. But Secretary Coleman testified in these proceedings against Judge Bork's nomination despite his admission to Senator Hatch that he knew of no event since 1981 casting doubt on Judge Bork's highest standards of professional integrity.

Four members out of the fifteen on the A.B.A.'s Committee voted that Judge Bork was "Not Qualified." One voted not to oppose the nomination. These determinations were apparently made by members not strictly applying the stated A.B.A. criteria. As noted above, Judge Bork's critics and supporters are united in believing that he has the requisite judicial competence, integrity, and judicial temperament. The only explanation for these dissenting opinions can be that they ignored the requirement that their review be restricted "primarily to issues bearing on professional qualifications" and did that which the Committee states it does not do: "investigate the prospective nominee's political or ideological philosophy." [3]

C. Judge Bork's Testimony

The consensus of the Judiciary Committee was that Judge Bork's testimony was the most candid and comprehensive of any Supreme Court nominee ever to appear before the Committee. All acknowledged that Judge Bork fully and faithfully answered every question put to him by the Committee, stopping short only of addressing specific questions that are likely to be presented to Judge Bork on whichever court he sits.

The Chairman, for example, told Judge Bork that he had been "straight-forward" about his views on constitutional interpretation. He complimented Judge Bork for doing his "best to answer." (Hearings 9/19/87, at 120). He said: "You have not attempted to step back and say I can't speak to that issue." And he concluded Judge Bork's testimony by saying, "I find you to be a very bright man who has done his best to let us know what he thinks in a complicated set of principles and areas that we have discussed." (Id.)

Senator Spector also complimented Judge Bork for his testimony. He said:

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[2] Although nominees for the District and Circuit Court appointments may earn, as did Judge Bork, the recommendation "Exceptionally Well Qualified," the rating of "Well Qualified" is the highest accorded to a Supreme Court nominee. See *Standing Committee on the Judiciary: What It Is and How It Works*, Sec. II.A (ABA 1983). The criteria by which those nominees are judged differs as well. During the hearings, Senator Simpson noted that the stated criteria for a District or Circuit Judge nominee include an examination of the nominee's political or ideological philosophy "to the extent that extreme views on such matters might bear on judicial temperament or integrity." No such exception is stated for Supreme Court nominees, giving rise to the inference—violated rather obviously in this case—that political ideology is not considered at all in considering a Supreme Court nominee's qualifications.

[3] In contravention of its own rules, the A.B.A. Report at least four time discussed the opposition on political and ideological grounds of some of those interviewed to Judge Bork's nomination.

> I want to compliment you for being so cooperative with this Committee. I believe that these hearings will set a new standard for Supreme Court nominees, which I think is really important. Last year, on the record, I expressed concern about the proceedings as to Justice Scalia not being able to get into issues.
>
> [Y]ou have been very generous with your time, and more than the generosity with your time, you have been in responsiveness.
>
> I think you have really dealt with the questions as best you can on very complex subjects, not to say that all the answers are going to please all of us, and I think you have had tough questions, perhaps questions at the belt—I don't think that they were below the belt—by the Committee. Depending on your perspective or someone's perspective there might be some differences to that, but you have tried to respond to the questions. (Hearings 9/19/87, at 69–70).

Senator Leahy agreed, noting that those who had watched the hearings had "seen a nominee responding forthrightly and willing in detail to the inquiries of members of this Committee, and I commend you for that." (Hearings 9/18/87, at 278).

Judge Bork testified in detail about his judicial philosophy, his views on the manner in which the Constitution should be interpreted, on *stare decisis*, on the First Amendment, the Equal Protection Clause of the 14th Amendment, privacy, rights and the separation of powers. He explained in detail his prior criticisms of cases such as *Shelley* v. *Kraemer, Katzenbach* v. *Morgan, Reynolds* v. *Sims, Harper* v. *Virginia Board of Elections, Griswold* v. *Connecticut, Roe* v. *Wade, Skinner* v. *Oklahoma, Brandenburg* v. *Ohio,* and *Cohen* v. *California,* among others. He explained that respected jurists and scholars—including some of the greatest jurists of this century such as Black, Stewart, and Harlan—had strongly criticized each of these cases. He spoke about his views on the Commerce Clause, the Commerce Clause cases, the Legal Tender cases, antitrust, and congressional standing. He addressed questions put to him about the War Powers Act, the Foreign Intelligence Surveillance Act, the Independent Special Prosecutor Act, and the constitutionality of the Pocket Veto, and others.

In an unprecedential manner, Judge Bork fully explained in detail his views on a broad array of complex and difficult legal questions. Judge Bork's candid and informative testimony revealed that he is both a thoughtful jurist and scholar of the highest order, one who combines a rich and probing intellect with an intimate knowledge of constitutional jurisprudence. Particularly in light of Judge Bork's universally acknowledged integrity, his candid and thorough answers to the searching questions posed should put to rest any issues or concerns that some may have had before he testified.

D. What Was Left Unsaid

Thus, by any historical standard for Supreme Court Justices, it is clear that Judge Bork is more than amply qualified to sit on the Supreme Court. Indeed, there was no serious question raised con-

cerning Judge Bork's performance in those areas most relevant as Solicitor General of the United States and his record as a Court of Appeals Judge for the District of Columbia Circuit. With little in Judge Bork's record of on-the-job performance to criticize, Judge Bork's opponents resort to scrutiny and censure of his writings as an academic and, what is worse, to distorting and mischaracterizing his record. In doing so, they ignore the truth.

They ignore his undisputed record of fairness and even-handedness as a judge. One indication of his impartiality is his record in labor cases. In 38 labor cases Judge Bork voted for the union nineteen times and for the employer nineteen times.

Judge Bork has a record as a strong advocate of the right to free speech. Judge Bork has written such important opinions as *Ollman* v. *Evans,* 750 F.2d 970 (D.C. Cir. 1984) (en banc), *Lebron* v. *Washington Metropolitan Transit Authority,* 749 F.2d 893 (D.C. Cir. 1984), *F.T.C.* v. *Brown & Williamson,* 778 F.2d 35 (D.C. Cir. 1985), and *Reuber* v. *United States,* 750 F.2d 1039 (D.C. Cir. 1984). In *Ollman,* Judge Bork relied on the changing realities of libel litigation to conclude that it was necessary to have greater first amendment protections for the press in that context. In *Lebron,* Judge Bork held that an administrative agency had violated an artist's rights by refusing to let him display a poster extremely critical of President Reagan in space leased for advertisements on the inside of subways. In *Brown & Williamson,* Judge Bork demonstrated his concern about any form of censorship and vacated an injunction restricting a cigarette company's ability to engage in certain kinds of advertising without prior FTC approval, and remanded to the district court to enter a less restrictive injunction. And in *Reuber,* Judge Bork sought to protect an employee of a private firm who had spoken critically of the government, arguing that an employee ought to be able to sue his employer if the employer was an agent of the government.

Judge Bork has an excellent record in civil rights cases, he has consistently and forcefully defended the civil rights of the parties appearing before him. As a judge, he has ruled for the minority or female plaintiff in seven of eight cases involving substantive civil rights issues. This includes cases such as *Emory* v. *Secretary of the Navy,* 819 F.2d 291 (D.C. Cir. 1987), where Judge Bork reversed a district court's decision dismissing a claim of racial discrimination against the United States Navy. His record includes *Laffey* v. *Northwest Airlines,* 740 F.2d 1071 (D.C. Cir. 1984), *cert denied,* 469 U.S. 1181 (1985), where Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its women employees. It includes *Palmer* v. *Schultz,* 815 F.2d 84 (D.C. Cir. 1987), where Judge Bork held in favor of women foreign service officers alleging discrimination by the State Department in assignment and promotion. It includes *Ososky* v. *Wick,* 704 F.2d 1264 (D.C. Cir. 1983), where Judge Bork voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system. It also includes *County Council of Sumter County, South Carolina* v. *United States,* 555 F.Supp. 694 (D.D.C. 1983), 696 F. Supp. 35 (D.D.C. 1984) (per curiam), where he held that the local county had failed to prove that its new voting system had "neither the purpose nor effect of denying or abridging the

right of black South Carolinians to vote." These decisions held (among other important rulings) that inferences of intentional discrimination can be made based solely on statistical evidence, that Title VII's statutory limitations should be liberally construed, and that female stewardesses may not be paid less than male pursers in the job that are only nominally different.

Judge Bork has an excellent record of collegiality and agreement with his colleagues on the D.C. Circuit, even those appointed by a Democratic President. For example, Judge Bork voted with Judges Ginsburg, Mikva, Edwards, Wald, and Wright, respectively, in 91, 82, 80, 76, and 75 percent of cases in which they sat together. Indeed, even those on the Committee opposing Judge Bork recognized the spuriousness of the statistics manufactured by a number of special interest groups and, commendably, made no effort to insert them into the record, or bring into the debate. This, if nothing else, should prove how arbitrary and misleading were these so-called statistical "studies."

Judge Bork has a perfect record of non-reversal by the Supreme Court. Not one of the more than 400 opinions Judge Bork authored or joined has ever been reversed. Some suggested that this was irrelevant because the Supreme Court had never reviewed a majority opinion he has written. Former Chief Justice Burger in response to question on this subject said "* * * if the question were addressed to one case, and the question was what is the meaning of the Court's denial of cert in one case, then it has very little meaning, because the Court does not explain why it denies review. But when you look at a whole block of cases over the 6 or 7 years that Judge Bork has been on the Bench, * * * then, it has real significance, that over that period of time and that number of cases, that nothing was found wrong or worthy of review; then, it has real meaning." First, that the Supreme Court has let every decision he has ever made stand as settled law, binding within its circuit, is highly significant. Professor Richard Stewart of Harvard Law School acknowledged this, calling Bork's record of non-reversal a "significant fact" because the "Supreme Court does reach out, especially the D.C. Circuit being a very important court in the Federal system, to take up cases that are important cases, where it thinks it is wrong[ly] decided." Second, the Supreme Court has agreed with positions Judge Bork articulated in dissent, either from a panel opinion or from a denial of rehearing en banc, six separate times. Finally, the Supreme Court has reviewed decisions he has joined, and always affirmed them, demonstrating conclusively that in those cases Judge Bork's understanding of the law was correct.

His overall excellence as a Federal judge is ignored by his opponents who argue that 90 percent of all cases are "non-ideological" and easy to decide, that Supreme Court precedent is controlling, and that this explains his perfect record. This argument, however, is based on a fundamental misunderstanding of the role of the appellate judge. Many cases afford judges ample opportunity for latitude and that there is in fact a great deal of discretion in deciding cases. If there were not, computers could mechanically apply settled law to facts.

Judge Bork's record as a Solicitor General was exemplary. He forcefully led the fight against discrimination in employment, in

education, in elections and in business. In 17 of 19 cases Solicitor General Bork's argument supported the civil rights plaintiff or minority interest. His cases include a large number of significant civil rights victories; including *Runyon* v. *McCrary,* 427 U.S. 160 (1976), which affirmed that Section 1981 applied to racially discriminatory private contracts; *United Jewish Organizations* v. *Carey,* 430 U.S. 144 (1977), which upheld race-conscious electoral redistricting to enhance minority voting strength; and *Lau* v. *Nichols,* 414 U.S. 563 (1974), which held that Title VI, and possibly the 14th Amendment, reached actions discriminatory in effect, though not in intent.

Judge Bork demonstrated exemplary sensitivity as a Solicitor General. For example, Stewart Smith, former Tax Assistant to the Solicitor General, who worked for Solicitor General Bork, told of Judge Bork's willingness to take the unusual step of confessing error to the Supreme Court. Mr. Smith had discovered that the Government's key witness had perjured himself to secure the conviction of a black man from Alabama on drug and income tax charges. Solicitor General Bork unhesitatingly followed Smith's recommendation. To those who contend that Solicitor General Bork was only doing the bidding of others, Mr. Smith said, "That is, with all due respect, errant nonsense. That is not the way the Solicitor General's Office behaved. It is not the way any chain of command behaved. I made the recommendation, but it was Robert Bork who ultimately made the decision, for which he can take credit or possibly blame." Former Deputy Solicitor General Jewell Lafontant testified that as the first black woman in her position, she had been excluded from many meetings, until she reported this to Solicitor General Bork, who quickly resolved the matter by directing that she be included. She also told of Solicitor General Bork's complete support for the Federal Women's Program.

Solicitor General Bork's record also belies the claim that he is devoted only and always to advancing the cause of executive power at the expense of Congress. As further detailed later in this report, he convinced the Ford Administration to end its use of the pocket veto except at the end of a congressional session. He also argued that Vice President Agnew should be indicted.

E. Political Consideration

In short, Judge Bork is unquestionably a man who possesses high intelligence, integrity, professional competence and judicial temperament; who has been endorsed by a former President, by a former Chief Justice, a setting justice of the Supreme Court, seven former Attorneys General, two top legal officers in the Carter Administration and a multitude of eminent legal scholars of differing ideological perspectives.

Ordinarily, this should put an end to any debate about Judge Bork's fitness to serve on the Supreme Court. However, politics and philosophical consideration were emphasized during the consideration of this nomination.

The history of the Advice and Consent clause shows that the Framers envisioned Senate confirmation as a tool for weighing the qualifications, rather than ideology, of each candidate. The historical evidence reflects the Framers' expectations that the President

would exercise great discretion in choosing nominees, while limiting the Senate's role to rejecting nonmeritorious candidates. The recent confirmations of Chief Justice Rehnquist and Justice Scalia are illustrative. Although those nominations "spawned more ideological opposition than any other court nominees in recent history," according to Professor Harry Abraham, each was confirmed easily. The Senate's unanimous confirmation of Justice Scalia, whose political and jurisprudential views are similar to those of Judge Bork, reaffirms that the Justice's personal political beliefs were not thought an appropriate consideration.

This has been recognized by Senators from both parties.

Just a few years ago the following comments were made by Senators in connection with the confirmation of Justice O'Connor.

> Senator BIDEN: "We are not attempting to determine whether or not the nominee agrees with all of us in each and every pressing social or legal issue of the day. Indeed, if that where the test, no one would ever pass by this Committee, much less the full Senate."
>
> Senator KENNEDY: "It is offensive to suggest that a potential justice of the Supreme Court pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential justice must pass the litmus test of any single issue interest group."
>
> Senator METZENBAUM: "I come to this hearing with no preconceived notions. If I happen to disagree with you on any specific issues, it will in no way affect my judgement of your abilities to serve on the Court."

And, as Senator Biden noted in the confirmation hearings for Abner Mikva, "The real issue is your competence as a judge and not whether you voted right or wrongly on a particular issue * * * If we take that attitude, we fundamentally change the basis on which we consider the appointment of persons to the bench.[4]

In our opinion, it is inappropriate to register opposition because one disagrees, on a policy level, with the particular results produced by sound judicial reasoning in narrow range of cases. The question is not whether a judge is making policy with which the policymaker's agree, but whether the judge has neutrally discerned and applied the policy choices made by the framers and legislators. In this regard there can be no doubt that Judge Bork is a principled and consistent jurist and scholar. Thus, the attacks on Judge Bork's judicial philosophy are and can be nothing more than a claim that he is disqualified from serving on the Supreme Court because he *interprets* the law, rather than makes it.

F. JUDICIAL PHILOSOPHY

The debate about Judge Bork is a debate about who should govern America. We must decide whether the most difficult, controversial, moral and social issues of our time will be decided by unelected judges without any constitutional warrant for doing so or by democratically-elected representatives of the people who are in-

[4] Sen. Biden, Hearing on Nomination of Abner Mikva to D.C. Circuit at 394, 396.

vested by the Constitution with this responsibility. That is the fundamental question raised by this nomination controversy.

Judge Bork, continuing in the long tradition of eminent jurists from John Marshall to Hugo Black to the two most recent appointees to the Supreme Court, believes that judges may override the policy choices made be democratic bodies only if that choice conflicts with a right than can fairly be discerned from the text, history and structure of the Constitution. Where the Constitution is silent—and it is deliberately silent on some of the most fundamental issues—those choices are to be made by the political process. Judges cannot impose their own version of "goodness" on legislatures. If there is no right anywhere in the Constitution which forecloses challenged legislative action, there is no warrant for a judge to overturn the value preferences because it furthers some abstract notion of goodness on which the Constitution is silent.

A judge's personal opinion as to the wisdom of legislation is entitled to no more deference than any other person's; it is the Constitution that defines individual's liberties that cannot be unsurped by the majority. That being the case, unless a judge can locate a right in that Constitution, then he has no right, no legitimate basis, for concluding that his personal preferences are superior to all others and may thus be imposed on American society. As Judge Bork has written:

> The question non-interpretivism can never answer is what legitimate authority a judge possesses to rule society when he has no law to apply . . . what entitles a judge to tell an electorate that disagrees that they must be governed by that philosophy? To see how extraordinary the claims of the non-interpretivists are it is useful to reflect that, if a judge wrote a statute and used it to decide a case before him, we would all regard that as an egregious usurpation of power, even though, it being a statute, the legislature could repeal or modify it. If moral philosophy would not justify a judge-written statute, how can it justify a judge-written constitution . . .?

Bork, *Foreword to G. McDowell, the Constitution and Contemporary Constitutional Theory* at VIII (1985). In other words, if courts use extra-constitutional principles to determine cases, if they strike down legislative or executive action based on their personal notions of the public good, they usurp powers not given to them by the Constitution. They transform our representative democracy into a judicial autocracy, and abandon the rule of law based on the consent of the governed for the rule of individuals based on the judge's subjective notions of what is best for society. For this reason, judges who enforce values not firmly grounded in the Constitution share in an activist mode of judicial review that cannot legitimately take place in our Madisonian, constitutional democracy.

To be sure, the Judiciary must be "activist" in that it zealously protects and furthers values that can actually be found in the Constitution and applies those values to conditions that the framers did not foresee. So there is nothing to the charge that faithfulness to the original meaning of the framers would somehow lead to dim-

inution of constitutional values or exclude from constitutional protection such modern developments as electronic surveillance or the broadcast media. Again, Judge Bork himself has made this point quite eloquently when he wrote:

> The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. The judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs the provision of a sole, fair and reasonable meaning fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedom the framers specified are made effective in today's circumstances . . . . In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application.

Ollman v. *Evans,* 750 F.2d at 995–96 (Bork, J., concurring).

However, the fact that a judge should give full scope to *constitutional* values in light of new threats to that value, cannot and does not mean that a judge is thereby free to somehow invent and impose *new* values wholly divorced from anything in the Constitution because he believes that these values are more "in tune" with the values shared by contemporary society. In the first place, it borders on the absurd to suggest that nine (or five) unelected, life-tenured judges are better able to discern and implement "consensus" values of a diverse, pluralistic society that are the elected, fixed-term representatives who have adopted the law being invalidated.

Most fundamentally, however, to engage in such judicial activism is to deprive, others of perhaps the most fundamental right secured to them in the Constitution: the right to self-government. Every time a court invents a new right, it correspondingly diminishes the area of democratic choice. While some may applaud this shrinking of democracy, because they are unable to convince others of the wisdom of their policies, this result can only be attained at the expense of democracy and the freedom of the American people.

The current judicial controversy over the constitutionality of the death penalty illustrates this distinction, as well as the wisdom of Judge Bork's judicial philosophy. Some justices believe that convicted murderers have a constitutional "right" not to be subjected to capital punishment. Of course, the source of this "right" is not the Constitution. To the contrary, the Constitution expressly acknowledges the availability of capital punishment in at least four different places. As Judge Bork has stated, "By conventional methods of interpretation, it would be impossible to use the Constitution to prohibit that which the Constitution explicitly assumes to be lawful." Bork, *Judicial Review and Democracy,* Encyclopedia of American Constitution 1063 (1986).

Consequently, some Justices look *beyond* the Constitution to create such a right, asserting that the death penalty is inconsistent with "evolving standards of decency that mark the progress of a maturing society." *Gregg* v. *Georgia,* 428 U.S. 153, 227 (1976) (Bren-

nan, J., dissenting). This, of course, is the "enlightened" judicial philosophy to which Judge Bork's opponents insists he must subscribe. The capital punishment controversy perfectly illustrates why such a philosophy is illegitimate in a society dedicated to Government by the people and the accuracy of Judge Bork's observation that "a judge who looks outside the Constitution looks inside himself—and nowhere else." *A Conference on Judicial Reform,* June 14, 1982, at 5.

As with all invented rights, a right to be free of capital punishment is not derived from any evolving moral standard of *society,* but only the judges personal moral code. As with all invented rights, it does not enhance freedom but redistributes it. Inventing rights for murderers denies rights to victims and, more important, the right of society to fix appropriate punishment for violent crime.

Of course, inventing rights can be used to serve "conservative" as well as "liberal" political ends. For example, in the early part of this century, the Supreme Court used the vague language of the due process clause of the 14th Amendment to strike down a host of economic and social legislation, typified by Justice Peckham's conclusion in *Lochner* v. *New York,* 198 U.S. 45 (1905), that "[t]he general right [of an employer] to make a contract in relation to his business is part of the liberty of the individual protected by [the due process clause] of the 14th Amendment of the Federal Constitution." That case used the due process clause to invalidate a State law limiting the number of hours that a baker could work to 60 hours per week. So important did this precedent become that the period in which the Supreme Court used the due process clause to invalidate progressive social reform legislation became known as the *Lochner* era.

Numerous other cases also used "substantive due process," the doctrine currently relied on in the "privacy" case, to invalidate similar economic and social regulations. In *Coppage* v. *Kansas,* 236 U.S. 1 (1915), for example, the Supreme Court held that a State could not prohibit employers from requiring, as a condition of an employment contract, that an employee not join a labor union. The Court held that the objective of "leveling inequalities of fortune" impermissibly interfered with "personal liberty and property rights." Similarly, in *Adkins* v. *Children's Hospital,* 261 U.S. 525 (1923), the Court invalidated a minimum wage law as violative of the due process clause. The number of such cases is by no means limited to these few examples, and, in fact, some of the precedent from this line of cases—*Meyer* v. *Nebraska,* 262 U.S. 390 (1923) and *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925)— have been expressley relied upon by the Court in deriving the generalized right to privacy that has recently been used to strike down a wide variety of laws, including a law forbidding the sale of contraceptives over-the-counter to unmarried minors, see *Carey* v. *Population Services International,* 431 U.S. 648 (1977), and a law requiring a pregnant minor either to obtain parental consent or to notify her parents before getting permission from a judge to have an abortion, see *Bellotti* v. *Baird,* 443 U.S. 622 (1979).

Judge Bork has indicated that the adoption of any extraconstitutional values through the due process clause is an illegitimate judicial usurpation of legislative authority. See Bork, *The Constitution,*

Orginal Intent, and Economic Rights, 23 San Diego L. Rev. 823 (1986). Judge Bork has therefore clearly indicated that he will apply the Constitution neutrally. He will not put his views ahead of the law by prohibiting States from adopting progressive social reform legislation that interferes with free market. By the same token, he will will not put the views of certain groups ahead of the law and recast the Constitution to accommodate their agenda. He will apply the Constitution and laws of the United States neutrally, without regard to the results. It is therefore most difficult to discern a *principled* or *consistent* basis for opposing Judge Bork's confirmation as Supreme Court Justice. Accordingly, it must be that Judge Bork's opponents deem fit only those judges who invent rights with which they agree. If the radical agenda consequently becomes a litmus test for confirmation to be a Federal judge, this irretrievably politicizes the judiciary, threatens its basic independence, and makes an end run around the democratic process to produce results that the people do not want and that are deeply rooted only in the conscience of the special interest groups and of a majority of the life-tenured, unelected Justices of the Supreme Court before whom these groups argue.

G. A Mainstream Jurist

Opponents of Judge Bork's nomination say he is an extremist and outside the mainstream of constitutional thought, and that if confirmed he will disrupt the delicate balance of the Supreme Court. These two charges, however, pose an inherent contradiction. If Judge Bork is such an extremist, he will plainly be unable to obtain the four votes necessary to impose his will on the Supreme Court. By the same token, if he can command the votes necessary to craft a majority, that must mean that a majority of the Supreme Court is outside the mainstream.

The latter proposition merits closer examination. Is Justice Scalia, confirmed unanimously just last year by this body, outside the mainstream? Is Justice O'Connor, confirmed unanimously by the Senate in 1981, outside the mainstream? Is Justice White, an appointee of President John F. Kennedy, outside the mainstream? Is Chief Justice Rehnquist, twice confirmed to the Supreme Court by this Senate, outside the mainstream? Are all these distinguished members of the Supreme Court extremists? The answer clearly must be in the negative. Yet it cannot be said that Judge Bork is an extremist who will command the votes of this working majority of the Court without also suggesting that these other four Justices are extremists outside the mainstream. Therefore, unless his vote will fail to "tip the balance" as claimed, Judge Bork too must be within the mainstream.

In fact, this Senate has confirmed men and women of integrity, and it is well known that Judge Bork's judicial philosophy of interpretivism—that is, interpreting, not making, the law—is well within the mainstream of constitutional thought. For example, Justice O'Connor has indicated her adherence to the interpretivist view. During her confirmation hearing, she asserted: "I do not believe that it is the function of the judiciary to step in and change the law because the times have changed or the social mores have

changed, but . . . I believe that on occasion the Court has reached changed results interpreting a given provision of the Constitution based on its research of what the true meaning of that provision is—based on the intent of the framers, [and] its research on the history of that provision." *Nomination of Sandra Day O'Connor,* Hearings Before the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 67 (1981). She also stated that she regarded the role of the judge as "appropriately one of judicial restraint." *Id.* at 108.

Justice O'Connor has repeated this theme since her appointment to the Supreme Court. In her dissenting opinion in *City of Akron* v. *Akron Center for Reproductive Health,* 103 S. Ct. 2481, 2505–06 (1983), a case invalidating certain regulations on abortion procedures, she wrote:

> Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.' "

If these views are not in the mainstream, it becomes very difficult to explain how Justice O'Connor was confirmed unanimously. It also becomes difficult to explain how she has built such an impressive record on the Supreme Court.

Justice Scalia, likewise, adheres to the philosophy that a constitutional judge's decisions must be guided by the original understanding of the Constitution. As a Justice, he has forcefully advanced constitutional interpretations according to the original meaning of the constitutional text. See, *e.g., Tyler Pipe* v. *Washington Department of Revenue,* 107 S. Ct. 2810, 2826–29 (1987) (Scalia, J., concurring) (arguing that "dormant" commerce clause jurisprudence is inconsistent with the text of the commerce clause and should be abandoned). Significantly, as a Circuit Judge, Justice Scalia joined Judge Bork's opinion in *Dronenburg* v. *Zech,* 741 F.2d 1388 (D.C. Cir. 1984), which held that there was no privacy right to engage in homosexual conduct, and which criticized the Supreme Court's open-ended privacy decisions. The *Dronenburg* opinion stated: "[W]hen the [Supreme] Court creates new rights, as some Justices who have engaged in the process state that they have done, lower courts have none of the[ ] [constitutional and historical] materials available and can look only to what the Supreme Court has stated to be the principles involved." *Id.* at 1395. The *Dronenburg* court also stated: "Aside from listing prior holdings, the [Supreme] Court [has] provided no explanatory principles that informs a lower court how to reason about what is and what is not encompassed by right of privacy." *Id.*

Indeed, if anything, Justice Scalia adheres to a stricter view of the degree to which a judge should follow the original meaning of the Constitution than has Judge Bork. One of the two cases in which Judges Bork and Scalia differed during their 4 years serving together on the D.C. Circuit was *Ollman* v. *Evans,* 750 F.2d 970, in which Judge Bork filed a concurring opinion stating that the increase in the number and size of libel claims required more judicial protection of libel defendants to ensure the freedom of the press.

See *Id.* at 993 (Bork, J., concurring). Judge Scalia dissented in sharp terms, stating that "not only is our cloistered capacity to identify 'modern problems' suspect, but our ability to provide condign solutions through the rude means of constitutional prohibition is non-existent." *Id.* at 1039 (Scalia, J., dissenting). Judge Scalia also described Judge Bork's opinion as "embark[ing] upon an exercise of . . . constitutional 'evolution,' with very little reason and very uncertain effect upon the species." *Id.* at 1036. If Judge Bork is outside the mainstream, it is difficult to understand why Judge Scalia's nomination to the Supreme Court just last year, was confirmed by a vote of *98–0.* Judge Scalia voted the same as Judge Bork in *98%* of the cases on which they both participated while serving together on the U.S. Court of Appeals.

Moreover, other sitting Justices have also embraced this interpretivist approach. For example, in *Bowers* v. *Hardwick,* 106 S.Ct. 2841, 2846 (1986), when the Court found that there is no constitutional right to engage in homosexual conduct, Justice White, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, wrote:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Similarly, Chief Justice Rehnquist has written:

> John Marshall's justification for judicial review [in *Marbury* v. *Madison*] makes the provision for an independent federal judiciary not only understandable but also thoroughly desirable. Since the judges will be merely interpreting an instrument framed by the people, they should be detached and objective. A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution.

W. Rehnquist, *The Notion of a Living Constitution,* 54 Tex. L. Rev. 693, 696–97 (1976). Surely, no one could reasonably contend that all of these Justices are outside the mainstream.

Historically, moreover, numerous other Justices, from widely varying positions on the ideological spectrum, have also shared the position that the original meaning of the constitutional text must guide constitutional interpretation. For example, in recent times, the great conservative Justice John Marshall Harlan expressed his agreement with the philosophy of original intent. In his separate opinion in *Oregon* v. *Mitchell,* 400 U.S. 112, 203 (1970), he stated:

> When the court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was com-

mitted, and it has violated the constitutional structure which is its highest duty to protect.

The great civil libertarian, Justice Hugo Black took a similar view. In his dissenting opinion in *Griswold* v. *Connecticut,* 381 U.S. 479, 513 (1965), he clearly articulated his belief that the Federal courts have only the limited task of applying and interpreting the text of the Constitution, rather than enforcing values not found in the Constitution. He stated:

> While I completely subscribe to the holding of *Marbury* v. *Madison* . . . that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notion of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not the power to interpret them.

Later in the same opinion, Justice Black definitively rejected the notion that there was any warrant in the open-ended terms of the 9th Amendment for the Justices to invalidate legislation because it was contrary to the moral value judgments of the Court. He forcefully argued:

> My Brother Goldberg has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice" or is "contrary to the collective conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not "consider their personal and private notions." One may ask how they can avoid considering them. The Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are "[collective] conscience of our people. Moreover, one would certainly have to look far beyond the language of the Ninth Amendment to find that the Framers vested any such awesome veto powers over lawmaking, either by the States or by Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine.

Id. at 518–19. No one, could seriously assert that this great Justice, an appointee of President Franklin D. Roosevelt, is outside the mainstream. Nor could anyone seriously make that charge against Judge Bork.

Justice Robert Jackson, another Roosevelt appointee to the Supreme Court, also sharply criticized judicial activism, which at the time had been marked by an aggressive use of the due process

clause to invalidate social and economic regulations with which the Justices did not agree. As an Assistant Attorney General in 1937, Robert Jackson decried this activist trend of reading extraconstitutional values into the Constitution. He stated:

> Let us squarely face the fact that today we have two Constitutions. One was drawn and adopted by our forefathers as an instrument of statesmanship and as a general guide to the distribution of powers and the organization of government . . . . The second Constitution is the one adopted from year to year by the judges in their decisions. . . . The due process clause has been the chief means by which the judges have written a new Constitution and imposed it upon the American people.

See Cooper and Lund, *Landmarks of Constitutional Interpretation,* 40 Policy Rev. 10 (1987). Thus, Justices Harlan, Black, and Jackson, three of the truly outstanding Justices of our era, have decried the use of values not rooted in the constitutional text to invalidate popular legislation. If Judge Bork is outside the mainstream, so are these giants of 20th Century jurisprudence.

This tradition of interpretivist judicial reasoning has deep roots in our Nations' history as well. For example, James Madison, perhaps the most influential of the Constitution's framers declared: "[If] the sense in which the Constitution was ratified by the Nation . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers." 9 *The Writings of James Madison* 191 (G. Hunt ed. 1900–1910). Similarly, Thomas Jefferson stated:

"I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a [judicial] construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction . . . Let us go then perfecting it, by adding, by way of amendment to the Constitution, those powers which time and trial show are still wanting." Letter from T. Jefferson to Wilson C. Nicholas (Sept. 7, 1803), collected in 10 *The Works of Thomas Jefferson* 10–11 (P. Ford ed. 1904–05) (as quoted in G. Haskins & H. Johnson, *History of the Supreme Court of the United States* 148 (1981) (Oliver Wendell Holmes Devise). The views of these influential men, who were active at the time our Constitution was framed and adopted, surely cannot be viewed as outside the mainstream, and neither can Judge Bork's. Further support for this view is drawn from the writings of some of the truly great Justices who have concurred in the interpretivist mode of constitutional construction. Chief Justice Marshall, for example, stated:

> [T]he enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said . . . [W]e know of no rules for construing [the Constitution] other than is given by the language of the instrument . . . taken in connection with the purpose for which [federal powers] were conferred.

Gibbons v. *Ogden*, 22 U.S. 1, 188–89 (1824). Justice Story likewise observed:

> It cannot . . . escape observation that this Court has a plain path of duty marked out for it, and that is, to administer the law as it finds it. We cannot enter into political considerations, on points of national policy . . . . [T]his Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive suitable redress.

The Apollon, 22 U.S. 362, 366–67 (1824). Thus, the interpretivist view of constitutional adjudication adhered to by Judge Bork is not only within the mainstream of constitutional thought, it defines the mainstream.

H. Judge Bork and Justice Scalia

The fact that Judge Bork is firmly situated within the constitutional mainstream is closely related to another, perhaps more interesting question that has already been raised. Last year, 98 Senators voted to confirm Judge Antonin Scalia to be an Associate Justice of the United States Supreme Court, and not one opposed the nomination. As discussed above, Justice Scalia, like Judge Bork plainly believes that the Constitution is to be interpreted as law, and not as a warrant for the imposition of the judge's moral predilections on society. If anything, Justice Scalia adheres to a more stringent view of the ability of judges to evolve constitutional guarantees to take account of modern circumstances than does Judge Bork. Compare *Ollman* v. *Evans*, 750 F.2d 970, 993 (D.C. Cir. 1984) (Bork, J., concurring), with *id.* 1036 (Scalia, J., dissenting).

Judge Bork and Judge Scalia served together for 4 years on the D.C. Circuit. In 86 cases on which they sat together, they agreed 84 times. That is 98 percent agreement. And the only significant case on which they disagreed was *Ollman*, in which Judge Bork was to Judge Scalia's left. Many of the cases that became most controversial at Judge Bork's hearings, moreover, were cases joined by Judge Scalia on the D.C. Circuit. See, *e.g.*, *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984; *Restaurant Corp. of America* v. *NLRB*, 801 F.2d 1410 (D.C. Cir. 1986); *Vinson* v. *Taylor*, 760 F.2d 1330 (D.C. Cir. 1985) (dissent from denial of rehearing *en banc*); *Oil, Chemical, and Atomic Workers* v. *American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984). And yet no one has even attempted an explanation of why there is such controversy over Judge Bork when the Senate unanimously confirmed Judge Scalia to the Supreme Court just last year. Judge Bork's record shows that, like Justice Scalia, he has outstanding qualifications to be an Associate Justice of the United States Supreme Court, and should be confirmed for that position.

CIVIL RIGHTS

A. Introduction

> If the social change is mandated by a principle in the Constitution or in a statute, then the Court should go ahead and bring about social change. *Brown* v. *Board of Education* brought about enormous social change and quite properly.

(Robert H. Bork, Testimony before the Senate Judiciary Committee, Sept. 16, 1987, at 91.)

B. Constitutional Protections Against Racial and Gender Discrimination

The Committee heard testimony confirming Judge Bork's unwavering commitment to equal justice under the law throughout his distinguished career. As a private practitioner, professor, Solicitor General and finally as a member of the Court of Appeals for the District of Columbia Circuit, Judge Bork's actions truly do speak louder than the allegation of his critics.

As a young associate in a large Chicago law firm, Judge Bork successfully fought to end the firm's policy of excluding Jewish lawyers. As Solicitor General, he moved quickly to put an end to the exclusion of the first black women, Deputy Solicitor General Jewel Lafontant, from meetings and policy decisions. He lent the power and prestige of his position to a movement designed to bring more women lawyers into the Justice Department. This personal commitment to civil rights became more and more evident to the Committee as it examined Judge Bork's positions on both Constitutional and statutory issues.

Judge Bork's dedication to the eradication of racial discrimination has been apparent from his earliest academic writings. Thus, in 1971, Professor Bork wrote of the 14th Amendment:

> it was intended to enforce a core idea of black equality against government discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that applies to all cases.

(Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 14–15 (1971).)

As a matter of Constitutional theory, Bork has been a consistent defender of the Supreme Court's decision in *Brown* v. *Board of Education*. In response to critics like Professor Herbert Wechsler

and Raoul Berger who argue that the framers of the amendment did not intend to affect segregated schools, Bork responds:

> By 1954 it had become abundantly apparent—through repeated litigation—that separate was never equal. They were not equal psychologically and the facilities were not even equal physically. The Court was, therefore, faced with a necessity to disregard part of the framers' intention in order to save the other part. To have chosen separation rather than equality would have been to read the Equal Protection Clause out of the Constitution. It seems to me the Court was bound to choose equality.

(Speech at Federalist Society Convention, January 31, 1987.)

As Solicitor General Robert Bork translated these long-held beliefs into action. In his four years in that office, Solicitor General Bork represented the United States in 19 substantive civil rights cases that did not require him to defend the Federal Government. In 17 of these 19 cases, Bork's argument supported the civil rights plaintiff or minority interest. The NAACP Legal Defense Fund sided with Solicitor General Bork in 9 of the 10 civil rights cases where they both filed briefs. The Justice on the Court who most often adopted the position argued by Solicitor General Bork in these cases was William Brennan.

The Committee heard detailed discussion of cases like *Pasadena Board of Education* v. *Spangler,* 427 U.S. 424 (1976), where Solicitor General Bork argued for full implementation of school desegregation through extensive bussing and school redistricting. In *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1975), Solicitor General Bork filed an *amicus* brief successfully arguing that Congress had the power under Section 5 of the 14th Amendment to abrogate a State's sovereign immunity. The case involved sex discrimination under title VII. Because the plaintiffs sought a monetary award from the State, both the district and appellate court found that the 11th Amendment barred relief. Solicitor General Bork argued to the contrary, stating in his brief:

> Congress . . . acted within its power to effectuate the Fourteenth Amendment in subjecting the states to the terms of Title VII to the same extent as private employers. The remedies are no less important to the goals of the statute than the rights conferred, and no more beyond Congress' power to prescribe.

Brief for the United States as Amicus Curiae at 8. The principle Solicitor General Bork helped to establish in the Fitzpatrick case is invoked again and again by civil rights plaintiffs seeking to enforce equal opportunity laws against the States.

Because of its specialized docket, the Court of Appeals for the District of Columbia Circuit does not often face substantive constitutional issues. Still, in a case involving consitutional rights, Judge Bork's vote came down firmly on the side of the individual in the face of governmental power. In *Emory* v. *Secretary of the Navy,* 819 F. 2d 291 (D.C. Cir. 1987), a black Navy captain claimed that the Navy promotions board had discriminated against him because of his race. Judge Bork voted to reverse the district court and to

firmly reject the govenment's arguments that constitutional guarantees do not apply to racial discrimination in military promotions. Judge Bork held:

> [c]onstitutional questions that arise out of military decisions regarding the composition of the armed forces are not committed to the other coordinate branches of government. Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally protected rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals.

(*Id.* at 294.)

Many hours of testimony were devoted to discussion of the Constitutional protections against gender discrimination. Judge Bork's position was firm and clear: the Equal Protection Clause protects all persons against laws which are based on unreasonable assumptions or stereotypes.

In his earlier writings, Judge Bork criticized the loose "rational basis" test which the Supreme Court applied to gender classifications. He referred to cases like *Goeseart* v. *Cleary*, 335 U.S. 464 (1964), where the Supreme Court upheld discrimination against women bartenders as "improper and intellectually empty." Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 12 (1971). In testimony before the Committee, Judge Bork reaffirmed his rejection of this "toothless standard" which the Court used to uphold even the most arbitrary and discriminatory laws.

Judge Bork has also indicated his disapproval of a "group approach" to the Equal Protection Clause. Under this scheme certain groups are entitled to "heightened scrutiny" of laws which place burdens upon them, while other groups receive virtually no protection at all. Judges are forced to pick and choose among various elements of society, favoring some and disfavoring others, without any guidance from the text or history of the Constitution. Accordingly to Judge Bork, this "protected groups" approach as propounded by Dean John Ely of Stanford "channels judicial discretion not at all and is subject to abuse by a judge of any political persuation." Catholic University Speech, March 31, 1982. Judge Bork indicated that if a group approach were adopted only racial and ethnic groups would be covered, since these were the only groups the framers had in mind.

Such an approach is, in Judge Bork's view, inconsistent with the language and history of Equal Protection Clause which prohibits denying *"any person"* equal protection under the law. Judge Bork indicated that he would follow the approach outlined by Justice Stevens in his opinion in *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985). In that case, Justice Stevens wrote:

> The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause.

> It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny" to decide such cases.

Judge Bork indicated that the Stevens' approach provided a much more coherent methodology for application of the Equal Protection Clause than does the group approach. It applies the clause to all persons *as individuals.* Under this view, all persons, including women, illegitimate children, aliens, and others are entitled to protection from classifications which do not rest upon a reasonable basis in fact.

For Judge Bork, the Equal Protection Clause prohibits unreasonable distinctions among *all* persons. In every instance, he would ask whether the trait being used to distinguish among citizens is in fact relevant because it actually tells the legislature something about a person's needs, abilities, or merit. If it is not a relevant trait to which a reasonable legislature would attach significance, then it is invidious discrimination and would be struck down.

According to Judge Bork this method of equal protection analysis is both more objective and more faithful to the language and intent of the Equal Protection Clause. A judge who claims adherence to the framers' intent and to neutral principles must search for a single standard which can be applied to all laws that distinguish between individuals on any basis. The search must begin with core concern of those who drafted the 14th Amendment which is, of course, racial classifications.

The central tenet of the 14th Amendment is that race is an unreasonable basis upon which to judge an individual's worth or status in the community. As Justice Stevens said, race is an attribute over which the individual has no control, which cannot be altered, and which tells society nothing about the individual's moral worth or ability. It is *per se* "unreasonable" for a legislature to make distinctions between individuals based on a trait which is so utterly irrelevant to any valid legislative goal.

In applying the Equal Protection Clause to gender classifications, Judge Bork would refer to the framer's concern with race for guidance. Gender, like race, is an immutable trait. It is a status over which the individual exercises no control, and it indicates nothing about a person's moral or intellectual stature. Since gender is irrelevant to almost all human activities, virtually any statute which limits the opportunities open to women because of their sex would not have a reasonable basis in fact.

In a discussion with committee members concerning the *Goeseart* case, Judge Bork indicated that there was no reasonable basis in fact for distinguishing men from women in determining who could obtain a bartender's license. The physical differences between men and women had no bearing on their relative abilities in that field. Judge Bork indicated that his test would operate to strike down any law which limited the employment opportunities open to women based on outmoded stereotypes. Since gender is irrelevant

to one's ability to be a doctor, lawyer or accountant, any restriction on women in any of these fields would, in Judge Bork's view, be as unreasonable as a law which disfavored people with blue eyes. In a letter dated October 1, 1987, to the Chairman of the Committee, Judge Bork outlined how he would apply the Stevens test:

> By focusing on the factual differences between individuals, the reasonable basis test distinguishes between laws which rest on genuine distinctions between persons and those based upon mere stereotypes. A law which limits the combat duties of women in the armed forces may indeed have a reasonable basis. It may be a fact that certain battlefront tasks require a physical strength or speed which very few women possess. Outside of the narrow areas where physical differences between the sexes are relevant, the reasonable basis test would operate to strike down all laws based upon mere habit or assumption. Distinctions based upon outmoded stereotypes can never satisfy a requirement that they have "a reasonable basis in fact" because they are in essence counterfactual, they ignore the factual similarities between persons in favor of unsupported assumptions.
>
> The results in cases like *Reed* v. *Reed* 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), would not change under my reasonable basis analysis. In *Reed*, the Court struck down a provision of the Idaho Probate Code which established an absolute preference for men over women in the appointment of administrators of estates. *Reed* was the first victory for women under the Equal Protection Clause, and the test applied by a unanimous court was remarkably similar to my own. The Court stated:
>
> A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

Reed, 404 U.S. at 76 (citation omitted). The preference for male administrators in *Reed* was not based on any factual difference between men and women, rather it was the product of an unthinking and *unreasonable* stereotype.

> In *Frontiero*, the Supreme Court concluded that an Air Force regulation prohibiting women from claiming their spouses as dependents on the same basis as men offended the concept of equal protection. Four justices would have elevated sex to the category of suspect classifications applying "strict scrutiny." Justices Stewart and Powell joined by Chief Justice Burger and Justice Blackmun, applied the rational basis test as announced in *Reed*. The result for all eight Justices was the same: the preference for men rested on the outmoded stereotype that men are "breadwinners" and women are dependent upon them. Under my view, the same result would follow. The law had no reasonable basis in fact as applied to servicewomen like Sharron Frontiero,

whose husband was a student *dependent on her* for a large part of his support.

Judge Bork's record as Solicitor General and Court of Appeals Judge belies the assertions of some groups that he would not apply the Equal Protection Clause to gender discrimination. In *Vorchheimer* v. *Philadelphia,* 430 U.S. 703 (1977), Solicitor Bork filed an amicus brief arguing that the maintenance of single-sex schools violates the Equal Protection Clause if they are not equivalent in educational offerings to their coeduational counterparts. As a Judge, in the case of *Cosgrove* v. *Smith,* 697 F. 2d 1125 (D.C. Cir. 1983), Judge Bork held that male prisoners could state a cause of action under the Equal Protection Clause for gender discrimination in parole regulations.

C. Civil Rights Protected by Statute

As all participants in the movement for civil rights will attest, Congress has played a leading role in enacting statutes protecting minorities, from the great post civil war Civil Rights Acts, now codified at sections 1981, 1982, 1983 and 1985 in title 42 of the U.S. Code, to the Civil Rights Act of 1964, inlcuding title VI on education, title VII on employment, the Voting Rights Act of 1965, among many other important statutes. Judge Bork has been in the forefront of the battle to apply and enforce each of these laws in a manner giving full effect to the intent of Congress. In this sense, Judge Bork is, and has, always been a jurist determined to uphold the rights passed into law by the elected branches of government.

It bears repeating that as Solicitor General, Mr. Bork filed briefs in favor of the minorities or women in 17 of the 19 civil rights cases that did not require the government to defend an agency policy, regulation or statute. Even the study cited by researchers critical of Judge Bork, comparing the civil rights amicus filings of Solicitors General Erwin Griswold, Robert Bork and Wade McCree, reveals virtually indistinguishable records—Griswold and Bork filed on behalf of the civil rights claimant in 76 percent of the cases, and McCree in 88 percent of the cases. The same pattern holds on the appellate court, where Judge Bork ruled in favor of the minority or female plaintiff in seven of the eight substantive civil rights cases he heard. He never rendered a decision less sympathetic to minority or female rights than that made by either the Supreme Court or Justice Powell.

The real key to Judge Bork's civil rights record lies in the landmark rulings he successfully argued to the Supreme Court or decided on the United States Court of Appeals for the District of Columbia Circuit.

1. TITLE VII

There is perhaps no statute more fundamental to civil rights than title VII of the Civil Rights Act of 1964, where Congress prohibited employment practices and devices discriminating on the basis of race, color, religion, sex, or national origin. In amicus filings in three related title VII cases, heard in three successive terms, Solicitor General Bork successfully advocated first that title VII confers rights that cannot be waived or barred by contractual

arbitration, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), that title VII remedies must be designed to "make whole" the injured employee and that proof of employment discrimination can be based on a discriminatory effect tests, *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and finally, in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), that title VII relief includes a retroactive award of seniority status, even though the statute only mentions backpay. One paragraph in *Franks* summarizes how the Solicitor General's filings supported the case-by-case articulation of far-reaching rules which significantly eased the burden on plaintiffs in proving claims of employment discrimination on the basis of statistical evidence and discriminatory effects, as well as receiving full relief for any such violations:

> We begin by repeating the observation of earlier decisions that in enacting Title VII . . ., Congress intented to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, *Alexander* v. *Gardner-Denver Co.* . . . and ordained that its policy of outlawing such discrimination should have the "highest priority," *Alexander*. . . . Last Term's *Albemarle Paper Co.* v. *Moody*, consistent with the congressional plan, held that one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." . . . This is emphatic confirmation that federal courts are empowered to fashion such relief [including retroactive grants of seniority] as the particular circumstance of case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring.

Franks v. *Bowman Transportation Co.*, 424 U.S. at 747–48 (citations omitted).)

Moreover, notwithstanding this success in three landmark title VII cases, culminating in *Franks*, the Solicitor General made several even more sweeping arguments that were rejected by the Court. For example, in *Teamsters* v. *United States*, 431 U.S. 324 (1977), the Supreme Court and Justice Powell rejected Solicitor General Bork's argument that even a wholly race-neutral seniority system violated title VII if it perpetuated the effects of prior discrimination. In *Washington* v. *Davis*, 426 U.S. 229 (1976), the Court rejected that an employment test with a discriminatory effect was unlawful under title VII. And in *General Electric* v. *Gilbert*, 429 U.S. 125 (1976), the Court rejected Solicitor General Bork's argument that discrimination on the basis of pregnancy violated title VII. Three years later Congress recognized the force of Mr. Bork's argument when it amended title VII with the Pregnancy Discrimination Act. As Solicitor General, the point was already clear to Mr. Bork: "The fact that women have different physical attributes from men does not, without more, justify applying different rules to women employees based on those attributes. Discrimination is not to be tolerated [under title VII] under the guise of physical properties possessed by one sex." Brief of the United States as *Amicus Curiae* at 15.

Judge Bork's support for title VII continued on the D.C. Circuit. In *Palmer* v. *Schultz,* 815 F.2d 84 (1987), he held in favor of women foreign service officers alleging discrimination by the State Department in assignment and promotion. *Palmer* also held that title VII discrimination could be proved solely by statistical inference.

In Ethnic Employees of Library of Congress v. *Boorstin,* 751 F.2d 1405 (1985), Judge Bork joined in reversing the district court because it required plaintiffs to offer direct proof of discriminatory motive in order to establish a case of prima facie discrimination. The ability to establish a prima facie case of discrimination by indirect means is the bedrock of much modern day title VII litigation. Judge Bork refused to tolerate any backsliding from this hard won principle. The court also ruled that title VII cannot preclude organizations from alleging first and fifth Amendment claims. Finally, recognizing that title VII vests broad discretionary powers in the courts, Judge Bork twice joined opinions liberally construing its statutory requirement that complaints be brought within a specified period of time. *Jarrell* v. *U.S. Postal Service,* 753 F.2d 1088 (1985); *Nordell* v. *Heckler,* 749 F.2d 47 (1984).

Beginning in 1973 and extending through to 1987, Judge Bork has participated fully in the growth of title VII as a potent statutory right barring discrimination in employment. In all cases, he was promoted the broad remedial purposes of the Act intended by Congress.

Notwithstanding Judge Bork's strong record in expanding and enforcing the civil rights statutes, much attention focused on a three-page article he wrote some 25 years ago. In that article, Professor Bork prefaced his remarks on the proposed Civil Rights Act of 1964 by stating, "[o]f the ugliness of racial discrimination there need be no argument." Bork, "Civil Rights—A Challenge," *The New Republic,* August 31, 1963, 21–24 at 22. He went on to question the *principle* of government coercion of private associational decisions. The Congress which passed the Civil Rights Act recognized the validity of Professor Bork's concerns when it exempted certain quasi-private establishments—the so-called Mrs. Murphy's boarding houses—from coverage under the act.

Judge Bork has since publicly disavowed this oposition to the Public Accommodations Act both in the classroom at Yale and before this Committee in 1973. The Committee heard testimony from members of Judge Bork's staff at the Solicitor General's office including that of Ms. Jewell LaFontant, the first black woman to hold the post of Deputy Solicitor General. Ms. LaFontant was unequivocal in confirming Solicitor Bork's personal commitment to vigorous enforcement of the civil rights laws. Moreover, the nominee himself stated before the Committee:

> I think the 1964 Act really did an enormous amount to bring the country together and bring blacks into the mainstream, and I think that is the way I should have judged the statute in the first place instead of on these abstract libertarian principles.

Note: With Judge Bork's record as appellate Judge and Solicitor General, as well as the testimony of Ms. LaFontant and Judge Bork, there can be no doubt that he has a strong commitment to

the enforcement of civil rights legislation which should not be impugned by dwelling on past statements which he has clearly disavowed.

2. VOTINGS RIGHTS

The Committee heard testimony concerning Judge Bork's two decisions in a case involving Section 5 of the Voting Rights Act of 1965. *County Council of Sumter County, South Carolina v. United States,* 555 F. Supp. 694 (D. D.C. 1983) and 596 F. Supp. 35 (D. D.C. 1984). Section 5 requires preclearance by the Attorney General of certain changes in voting procedures, and bans any change that would "have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1982). The Sumter County Council brought suit against the Attorney General seeking a declaratory judgment that its switch to an at-large system for election of councilmen did not violate section 5.

In the first decision, Judge Bork rejected the Council's argument that the switch from Gubernatorial appointment to at-large election did not constitute a change in voting procedures for purposes of the Act. He also voted to allow seven black residents of Sumter County to intervene in the action, finding that "[t]heir local perspective on the current and historical facts could be enlightening. . . ." 555 F. Supp. at 697.

In the final decision in the case, Judge Bork found that "a fairly drawn single-member district election plan would give black voters of Sumter County a better opportunity to elect candidates of their choice to the Sumter County Council than the at-large system does." 596 F. Supp. at 37. He thus refused to certify the new procedure, holding that the County Council had "failed to carry [its] burden of proving that the at-large system was not maintained. . . . for racially discriminatory purposes and with racially discriminatory effect. *Id.* at 38. In our view, Judge Bork's decision in *Sumter County* underscores his commitment to the protection of voting rights.

Judge Bork reaffirmed that commitment in his testimony before the Committee, stating:

> I think the Voting Rights Act has been enormously successful in improving the quality of black life, particularly in the South, because they became a voting group that politicians had to listen to once they got access to the polls.

The testimony also confirmed Judge Bork's unwavering commitment to an active judicial role in enforcing electoral fairness under the Constitution. Judge Bork reiterated his support for the principle of judicial oversight of legislative reapportionment announced in the case of *Baker* v. *Carr,* 369 U.S. 186 (1962), although as he indicated in 1971, he would decide these cases under the guarantee of a republican form of government embodied in Art. IV, § 4 of the Constitution. As Judge Bork wrote in 1968:

> Population shifts and a number of other factors had left a number of legislatures wretchedly apportioned, and political routes to reform were blocked precisely because the ag-

> grieved voters were underrepresented. The Warren Court can hardly be faulted for entering this previously avoided thicket. . . .

Bork, *The Supreme Court Needs a New Philosophy, Fortune,* December, 1968, p. 166.

Judge Bork indicated that he would apply the test enunciated by Justice Stewart in his opinion in *Lucas* v. *Colorado Gen. Assembly,* 377 U.S. 713, 753–54 (1964). Under that analysis, legislative reapportionment plans which are irrational or which "permit the systematic frustration of the will of the majority of the State" would be struck down as unconstitutional.

Some witnesses and Committee Members expressed concern that Judge Bork would not apply the one-person one-vote rule. Judge Bork explained that such a rigid approach often leads to the division of cities and towns into separate voting districts, and can actually be used to dilute the voting strength of minority groups. Several academic panelists noted that there is growing discontent on the Supreme Court itself concerning the rigid standard. The case of *Karcher* v. *Dagget,* 462 U.S. 725 (1983) was mentioned. There Justices White, Powell and Rehnquist, joined by Chief Justice Burger dissented from a rigid application of the one-person one-vote standard to the New Jersey State legislature. Justice Powell, forcefully stated the dissenters' views when he expressed doubt that the Constitution "could be read to require a rule of mathematical exactitude in legislative reapportionment," and charged that the majority's by the numbers approach was "self-deludging." *Id.* at 784.

Judge Bork also indicated that he would apply the Equal Protection Clause to reapportionment cases. As he summarized his position before the Committee:

> Nobody doubts that an apportionment which is discriminatory can be struck down. Nobody doubts that an apportionment which a majority cannot change should be struck down. The only question is whether this rigid formula [one person-one-vote] is good or not.

Some witnesses attempted to disparage Judge Bork's exceptional record on voting rights issues by suggesting that he is in favor of racially-biased poll taxes. This criticism is wholly unfounded. Judge Bork's only testimony on the subject of poll taxes in these hearings concerned the Supreme Court's decision in *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966). In *Harper,* the Court invalidated Virginia's $1.50 poll tax. Judge Bork testified that "I have no desire to bring poll taxes back into existence. I do not like them myself." At the same time, Judge Bork explained that the Court's reasoning appeared to him to be deficient, views that he had given to this Committee in 1973. (*Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General,* Hearings before the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 17 (1973).)

Judge Bork observed that, prior to *Harper,* "[t]he poll tax was familiar in American history and nobody ever thought it was unconstitutional unless it was racially discriminatory." He also pointed out that "Congress had just recently drafted and proposed" and the

states "had adopted an anti-poll tax amendment to the Constitution which this Congress carefully limited to federal elections so as to leave state poll taxes in place if states chose to have them. That seemed to me a little odd, therefore, that the Court would come along and mop up something that Congress [deliberately did not] amend the Constitution to accomplish." Judge Bork's comments seem uncontestable. Under the rationale of the *Harper* decision, the 24th Amendment is a pointless constitutional change.

Judge Bork's analysis of the *Harper* decision in 1973 and again in these hearings does not in any way suggest a weakened support for the voting rights of minorities. Judge Bork testified before the Committee that if the tax had been "applied in a discriminatory fashion, it would have clearly been unconstitutional." But, as Judge Bork pointed out, the *Harper* court simply ignored this issue. Justices Black, Stewart, and Harlan made much the same points in their dissents. *Id.*, at 672 (Black, J., dissenting); *id.*, at 683 n.5 (Harlan, J., dissenting).

Judge Bork stands with distinguished jurists on the Court in suggesting that nondiscriminatory poll taxes are constitutional. In 1937, a unanimous Supreme Court rejected a similar challenge to Georgia's $1 poll tax. See *Breedlove* v. *Suttles*, 302 U.S. 277 (1937). At the time, the Court included such eminent jurists as Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone, Benjamin Cardozo, and Hugo Black. In 1951, the Court summarily rejected a challenge to the law struck down 14 years later in *Harper*. See *Butler* v. *Thompson*, 431 U.S. 937 (1951) (per curiam). Justices Felix Frankfurter, Robert Jackson, Stanley Reed, Harold Burton, Tom Clark, Sherman Minton, and Chief Justice Fred Vinson rejected the same arguments accepted in *Harper*, while Justice Douglas stood alone in dissent. Thus, many distinguished justices agreed with Judge Bork's view of the issue, to say nothing of the three dissenters in the *Harper* decision, Justices Black, Harlan, and Stewart.

A number of respected commentators concur with Judge Bork's observation in analysis of *Harper*. Alexander Bickel agreed with Justice Black's dissent that the Court gave " 'no reason' " for its decision, A. Bickel, *The Supreme Court and the Idea of Progress* 59 (1970), and Professor Cox conceded that the opinion seemed "almost perversely to repudiate every conventional guide to legal judgement." A. Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* 125, 134 (1968). Professor Kurland, who has harshly criticized many Warren Court decisions, called *Harper* "one of the Court's shakiest opinions." P. Kurland, *Politics, the Constitution, and the Warren Court* p. 164 (19—).

The Court's stated rationale was the "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." 383 U.S. at 668. But the Supreme Court has since flatly rejected *Harper's* suggestion that wealth-based classifications are subject to heightened judicial scrutiny in an opinion authored by Justice Powell. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973). Similarly, notwithstanding *Haprer*, the Supreme Court has subsequently upheld a number of State-imposed restrictions on voting. See *Richardson* v. *Ramirez*, 418 U.S. 24 (1974) (upholding prohibitions on voting by convicted felons); *Oregon* v. *Mitchell*, 400

U.S. 112 (1970) (upholding minimum age requirements for state voters). Judge Bork's views on the *Haprer* decision thus seem to find sympathy among hte current members of the Court.

3. EQUAL PAY ACT

Corning Glass v. *Brennan,* 417 U.S. 188 (1974), is recognized as a landmark Equal Pay Act case. In this case Solicitor General Bork filed an amicus brief arguing that men could not be paid more than women for similar jobs on different shifts. The brief gives full effect to congressional will seeking to thwart reduced payments to women performing the same work as men.

Laffey v. *Northwest Airlines, Inc.,* 740 F.2d 1071 (D.C. Cir. 1984), follows directly in the path established by *Corning Glass* and conclusively demonstrates Judge Bork's commitment to upholding women's rights. Judge Bork rejects the argument made by the airline that women performing essentially the same job as men could be paid less because they were called stewardesses instead of pursers. The language of the per curiam opinion demonstrates Judge Bork's clear, practical reasoning: "[N]either Congress nor the Court has ever entertained the notion that an employer who intentionally classifies jobs by sex, and in fact pays women less for the same work, can achieve exoneration by showing he sincerely thought the jobs he separated by sex were different." *Id.* at 1080.

Similarly, in *Ososky* v. *Wick,* 704 F.2d 1264 (1983), Judge Bork agreed that the Equal Pay Act covers women employed in the foreign service. This is but one of many cases in which Judge Bork flatly rejected the government's argument. In fact, Judge Bork joined in reversing the district court judge who had dismissed the suit on procedural grounds and expressed "grave doubts" that the Equal Pay Act applied. The government argued that the Act's principle of "equal pay for equal work" is incompatible with the flexible personnel system used by the Foreign Service, which is designed to accommodate regular, worldwide transfers of highly qualified personnel without adjusting salaries precisely to the job. Judge Bork found no indication that Congress silently intended an exemption for this executive agency and therefore refused to carve out special relief, even for an agency claiming exceptional need.

Again, the record is clear. For more than a decade, and indeed long before the issue of gender based wage discrimination was a visible public issue, Judge Bork has pursued Congress's directive that equal pay be given for work equal in "skill, effort, responsibility." 29 U.S.C. § 206(d). Twice he ruled or argued against large corporations, and once against the executive branch. This typifies Judge Bork's jurisprudence and his commitment to carrying out the intent of Congress that the civil rights laws in this country be vigorously enforced.

4. TITLE VI

Title VI of the Civil Rights Act includes a provision banning discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance." First a district court, and then an appellate court found that this provision was not violated when a public school system

took no affirmative steps to teach English to 1,800 students of Chinese ancestry. The full court voted to deny a rehearing, leaving intact the appellate court's decision that "every student brings to the starting line of his educational career different advantages and disadvantages" and that the act does not impose affirmative teaching obligations on the school system. Despite these rulings below, Solicitor General Bork not only filed an amicus brief urging reversal, but he successfully argued that title VI reached actions with only a discriminatory effort, even absent any discriminatory intent. He thus simultaneously put the Government on record that the title VI prohibition on discrimination applies broadly and can be proven without evidence that the defendant intended to discriminate. In 1973, these were leading and unsettled issues in civil rights law.

D. Runyon v. McCrary and State Action

Solicitor General Bork led the fight on behalf of the Government in 1976 establishing, for the first time, that the post civil-war statute now codified at 42 U.S.C. § 1981 prevented private schools from denying admission to children solely because they were black. *Runyon* v. *McCrary,* 427 U.S. 160 (1976). Section 1981 assures to blacks and all minorities the same right to make and enforce contracts as whites. As pointed out by the dissent in *Runyon,* the statute for almost 100 years had reached only discrimination imposed by State law. Justice Powell in a concurring opinion found the dissent's reading of the statute "quite persuasive," but felt bound by the Court's prior precedents. The dissent expressly denied, however, that there was binding case law extending the reach of Section 1981 to the enforcement of private contracts between non-consenting parties.

Notwithstanding this dispute over the text and history of the statute, Solicitor General Bork argued that section 1981 "reaches the actions of private individuals not in any way facilitated by state law." Amicus Brief for United States at 11. He further argued that section 1981 should not in any event be restricted to a "purely literal interpretation" since a contract for schooling "is at the core" of the statutory rights afforded to blacks. *Id.* Finally, he rejected respondents' claim that forced enrollment would violate their right of association or an asserted constitutional right of privacy. The majority of the Court accepted every one of these arguments and firmly established the broad reach of Section 1981 to prohibit even purely private acts of discrimination.

This successful advocacy in *Runyon,* demonstrates that Judge Bork was not showing an insensivity to the rights of minorities when as a law professor he criticized the Supreme Court's state action rationale in *Shelley* v. *Kramer,* 334 U.S. 1 (1948). Judge Bork's questioning of the threshold reasoning in the case never extended to the result, where the Court struck down private racial covenants barring the sale of homes to blacks. Equally to point, the holding in *Runyon* would, as Judge Bork testified, "also bar the racially restrictive covenant that was involved in *Shelley* v. *Kramer.*"

Shelley held that private racially restrictive covenants, no matter how "discriminatory or wrongful," did not in themselves violate

the Constitution, but that enforcement of the covenants in State court satisfied the State action requirement of the 14th Amendment. It is now widely acknowledged that the case did not state a neutral principle capable of explaining when private conduct is transformed into State action.

The concept of neutral principles is designed to test whether a court will take the ruling announced in one case and apply it to future cases that cannot in good faith be distinguished. As Judge Bork explained in his 1971 Indiana Law Article and explained again in his testimony, *Shelley* v. *Kramer* does not pass this test: "The difficulty with *Shelley* was not that it struck down a racial covenant, which I would be delighted to see happen, but that it adopted a principle, which if generally applied, would turn almost all private action into action to be judged by the Constitution."

Judge Bork illustrated this defect in *Shelley*'s "neutral principle" with an example. "If people at a dinner party get into a political argument, and the guest refuses to leave when asked to do so by the host, and finally the host calls the police to have the unwanted guest ejected, under *Shelley* v. *Kramer* that would become State action, and the guest could raise the first Amendment. His first Amendment rights had been violated because a private person got sick of his political diatribe and asked him to leave and the police assisted. In that way, any contract action, any tort action, any kind of action can be turned into a constitutional case."

Judge Bork's analysis in *Shelley* is now conventional wisdom. For example, Professor Tribe writes that Shelley's reasoning "consistently applied would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement." Professor Tribe quite clearly notes that *Shelley,* had it been further applied, would have reduced the state action requirement to a mere formality, which the Court self-evidently has refused to do. L. Tribe, *American Constitutional Law* at 1156–57 (1978). For example, Justice Black, in a 5–2 decision, found no state action even though a state court enforced the explicit, racially discriminatory terms of a donor's will after a trust failed that had conveyed park land to the city for the sole use of whites. *Evans* v. *Abney,* 396 U.S. 435 (1970). The Court rejected Justice Brennan's argument that *Shelley* applied. In *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972), a fraternal lodge allegedly would not serve a man a drink solely because he was black. The court held, in a 6-3 opinion written by Justice Rehnquist, that the liquor license awarded by the state did not "in any way foster or encourage racial discrimination" and therefore there was no State action entitling Irvis to broad relief. *Id.* at 176–77. See also *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974); *Flagg Bros., Inc.* v. *Brooks,* 436 U.S. 149 (1978).

Most recently, Justice Powell, in one of his last opinions for the Court, summarized the governing test for state action: "[The government] can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee,* 55 U.S.L.W. 5061,

5067 (June 25, 1967). The state action rationale in *Shelley* self-evidently cannot be reconciled with this new standard: the court did not there encourage the private discrimination or force the parties to adopt the racially restrictive covenant. As predicted by Judge Bork in 1971, and now confirmed in 1987, "[*Shelley*] has no generative force. It has not proved to be a precedent. As such, it is not a case to be reconsidered. [The Court] did what it did; it adopted a principle which the Court has never adopted again."

In sum, Judge Bork's accurate and now-accepted critique of *Shelley* in no way endorsed racially restrictive covenants. This criticism is misplaced because Judge Bork, like Professors Herbert Wechsler and Louis Henkin before him, criticized the theory of State action, not the underlying decision on the merits. It is irrelevant because Congress in 1968 foreclosed the use of racial covenants in the Fair Housing Act. It ignores the virtual isolation of *Shelley* in subsequent Supreme Court case law, culminating with Justice Powell's decision in *San Francisco Arts*. As noted, it ignores Solicitor General Bork's successful advocacy in *Runyon*, where he proved by his actions his commitment to striking down private discriminatory contracts previously thought to be beyond the reach of the nation's civil rights laws.

E. Vinson v. Taylor

Some witnesses suggested that Judge Bork's dissent from a denial of rehearing in the case of *Vinson* v. *Taylor*, 753 F.2d 141, *rehearing en banc denied*, 760 F.2d 1330 (D.C. Cir. 1985), *aff'd in part and remanded sub nom. Meritor Savings Bank* v. *Vinson*, 106 S. Ct. 1299 (1986), indicated his hostility to sexual harassment claims under title VII. Much of the contrary, testimony before the Committee indicated that Judge Bork, joined by then-Judge Scalia and Judge Starr, was simply flagging important legal issues whose resolution was necessary to the fair and evenhanded application of title VII to these claims.

The case involved a sexual relationship between Mechele Vinson, a bank employee, and Sidney Taylor her supervisor. The district court had found that:

> [I]f [Vinson] and Taylor did engage in an intimate or sexual relationship during the time of [Vinson's] employment at Capital, that relationship was a voluntary one by [Vinson] having nothing to do with her continued employment at Capital or her advancement or promotions at that institution.

Vinson v. *Taylor*, 23 Fair. Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980). The district court dismissed Vinson's title VII claim, but a three-judge panel of the Court of Appeals reversed that decision.

Judge Bork disagreed with the panel's legal rulings on the liability of Taylor's employer for his actions. In its review of the panel's decision, the Supreme Court agreed with Judge Bork on both of these issues.

On the evidentiary issue presented in *Vinson*, *Judge Bork believed* that the panel was wrong in holding that "a supervisor must not be allowed to introduce . . . evidence of an employee's dress or

behavior in an effort to prove that any sexual advances were *solicited or welcomed.*" 760 F.2d at 1331. The Supreme Court said that the panel was wrong in excluding this evidence because "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome." 106 S. Ct. at 2407.

On the liability issue of *Vinson,* Judge Bork disagreed with the panel's imposition of automatic liability on an employer for an employee's harassment, noting that "we ought to take up the difficult and important question of the employer's vicarious liability under Title VII for conduct he knows nothing of and has done all he reasonably can to prevent." 760 F.2d at 1331. On the liability issue, the Supreme Court stated "we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by the supervisors." Like the Supreme Court, Judge Bork was concerned to distinguish between the voluntary office romance and the case of unwelcomed advances by a superior. Judge Bork never questioned the applicability of Title VII to sexual harassment cases, he merely noted a need for sensitivity and flexibility in doing so. *Vinson* is a prime example of Judge Bork's careful attention to complex legal issues, his insights were adopted by a unanimous Supreme Court.

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The Committee also heard testimony that in Judge Bork's view section 5 of the 14th Amendment gives Congress broad remedial authority to eradicate unlawful racial discrimination. This has been Judge Bork's publicly stated view since the early 1970's when he wrote that "it seems beyond doubt, then, that Congress has substantial power over the remedies used by Federal courts, even in constitutional cases, and that the source of that power in desegregations cases is located in section 5 of the Fourteenth Amendment." (The Constitutionality of the President's Busing Proposals at 16–17 (1972).)

Pursuant to the section 5 power, Congress suspended the use of literacy tests in states with a history of discrimination, as affirmed in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966). Judge Bork expressly approved this holding, 1973 Confirmation Hearings at 16, and this use of remedial power because Congress acts properly whenever "it attempt[s] to relate the prohibition [of literacy tests] to any criterion indicating the discriminatory use of literacy tests."

In *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), decided the same year as *South Carolina* v. *Katzenbach,* the Supreme Court upheld a provision of the Voting Rights Act barring the use of English language literacy tests for any person who had completed sixth grade in Puerto Rico, whether or not there was any indication that such tests were used to discriminate. The case has long been controversial, not because of its holding, but because the Court seven years earlier said a State's nondiscriminatory use of literacy tests *does not* violate the 14th Amendment. *Lassiter* v. *Northhamption Election Bd. of Elections,* 360 U.S. 45 (1959). As has been pointed out by numerous scholars, including Judge Bork, Congress expanded and

redefined the scope of the 14th Amendment *after* the Supreme Court had spoken. This challenges the well-settled principle that the Court is final arbiter of the Constitution. *Marbury* v. *Madison, 5 U.S. (1 Cranch) 137 (1803). In the words of Archibald Cox:*

> The [Morgan] Court held that Congress effectively determined that a State [literacy] law violated the Fourteenth Amendment and set it aside even though the Supreme Court—so often billed as the ultimate interpreter of the Constitution—would have sustained the same law."

(Cox, the Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199, 228 (1971).)

For this reason, Justice Harlan and Stewart dissented in *Morgan,* writing that the decision was "at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function." 384 U.S. at 659. Four years later, the majority of the Court explicitly rejected that *Morgan* rationale in considering the constitutionality of Congress' attempt to lower the voting age from 21 to 18. *Oregon* v. *Mitchell,* 400 U.S. 112 (1970). And in 1980, Justice Powell applied the argument to the 15th Amendment, holding that "Congress may impose such constitional deprivations only if it is acting to remedy violations of voting rights." (*City of Rome* v. *United States,* 446 U.S. 156, 200 (1980) (Powell J., dissenting).)

In short, Judge Bork, in the best of company, criticized *Morgan* in order to protect the Court's power to safeguard constitutional privileges against encroachment by the political branches. At the same time, Judge Bork has always strongly affirmed the authority of Congress to remedy discriminations, as evidenced by his support for *South Carolina* v. *Katzenbach.* This twin philosophy was put to the test when he testified before Congress against enactment of a Human Life Bill, which sought to expand and redefine the protection of the 14th Amendment to include features as persons, thereby barring abortion by statute and, in effect, overruling *Roe* v. *Wade.* As in *Morgan,* the law was not targeted to remedy discrimination and it would have "replace[d] the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution." (The Human Life Bill: Hearings before the Subcomm. of Separation of Powers of the Comm. on the Judiciary, 97th Cong., 1st Sess. 310 (1981).)

F. Conclusion

In response to question "where was Judge Bork on civil rights," the answer is in the Supreme Court fighting for the rights of minorities and on the appellate court expanding the protections of the Constitution, title VI, title VII, the Voting Rights Act and the Equal Pay Act.

RIGHT TO PRIVACY

Another area Judge Bork discussed was the Constitution's protection of individual liberty. As Judge Bork's testimony before, and subsequent letters to the Committee indicated, the Constitution protects numerous and important aspects of liberty. For instance,

the First Amendment protects freedom of speech, press, and religion; the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures;" and the Sixth and Seventh amendments protect the right to trial by jury. All of these freedoms and more are fundamental. Judge Bork has made it quite plain that, in his view, a judge who fails to give these freedoms their full and fair effect fails in his judicial duty. But Judge Bork has also stated that merely because a judge must be tireless to protect the liberties guaranteed by the Constitution does not mean that judges should make up a right to liberty or personal autonomy not found in the Constitution. Once a judge moves beyond the constitutional text, history, and the structure the Constitution creates, he has only his own sense of what is important or fundamental to guide his decisionmaking. We believe, as Judge Bork does, that a judge has no greater warrant to depart from the Constitution than does Congress or the President. In other words, judges, even of the Supreme Court, are not above the law.

This means that where the constitutional materials do not specify a value to be protected and have thus left implementation of that value to the democratic process, an unelected judge has no legitimate basis for imposing that value over the contrary preferences of elected representatives. When a court does so, it lessens the area for democratic choice and works a significant shift of power from the legislative to the judicial branch. While the temptation to do so is strong with respect to a law as "nutty" and obnoxious as that at issue in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), the invention of rights to correct such a wholly, misguided public policy inevitably involves the judiciary in much more difficult policy questions about which reasonable people disagree, such as abortion or homosexual rights.

As Judge Bork has told us, while a legislator obviously can and should make distinctions between such things as the freedom to have an abortion and the freedom to use contraceptives, a court cannot engage in such *ad hoc* policymaking. A court cannot invent rights that apply only in one case and are abandoned tomorrow in a case that cannot fairly be distinguished. The process of inventing such rights is contrary to the basic premises of self-government and inconsistent application denies litigants the fairness and impartiality they are entitled to expect from the judiciary.

This was the basis of Judge Bork's criticism of Justice Douglas' opinion in *Griswold,* the case invalidating Connecticut's statute banning the use of contraceptives. To put the decision in perspective, Judge Bork noted that *Griswold,* even in 1965, was for all practical purposes nothing more than a test case. The case arose as a prosecution of a doctor who sought to test the constitutionality of the statute. There is no recorded case in which this 1879 law was used to prosecute the use of contraceptives by a married couple. The only recorded prosecution was a test case involving two doctors and a nurse, and in that case the state itself moved to dismiss.

This point was made by Justice Frankfurter 4 years before *Griswold* in *Poe* v. *Ullman,* 367 U.S. 497 (1961), a case rejecting an earlier attempt to have the Connecticut law invalidated. In addition, Justice Frankfurter's opinion took judicial notice of the fact that

"contraceptives are commonly and notoriously sold in Connecticut drug stores," and concluded that there had been an "undeviating policy of nullification by Connecticut of its anticontraceptive laws throughout all the long years that they have been on the statute books." *Id.* at 502. Thus, it cannot realistically be said that failure to invalidate the Connecticut law would have had any material effect on the ability of married couples to use contraceptives in the privacy of their homes.

Judge Bork's principal objection to the majority opinion in *Griswold* was the Court's construction of a generalized right of privacy not tied to any particular provision of the Constitution to strike down a concededly silly law which it found offensive. Justice Black's dissent, joined by Justice Stewart, made precisely the same point:

> While I completely subscribe to the [view] that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them.

381 U.S. at 513.

Justice Black proceeded to declare this unequivocal rejection of the existence of a general right of privacy based on the Constitution:

> The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not.

381 U.S. at 508.

At the hearings Lloyd Cutler pointed out the similarities between this passage and Judge Bork's view: "He [Bork] does not agree intellectually with a generalized right of privacy. I believe that Justice Stewart did not agree intellectually with a generalized right of privacy." (Hearings, 9/23/87 at 144.)

Of course, Judge Bork has stated repeatedly that had the state actually sought to enforce the law against a married couple, questions under the Fourth Amendment as well as under the concept of fair warning would certainly have been presented.

Absent a violation of such a specific, constitutionally granted right of privacy, however, it is difficult to discern the constitutional impediment to the Connecticut law. In Judge Bork's view, Justice Douglas' attempt to do so by creating a free-floating, "right to privacy" does not state a principle of constitutional adjudication that was either neutrally derived or which would be neutrally applied in the future.

As Judge Bork noted in his Indiana Law Review article, the "zones of privacy" discussed by Justice Douglas do not really have

anything to do with privacy at all. These zones of privacy, he stated,

> protect both private and public behavior and so would more properly be labelled "zones of freedom". If we follow Justice Douglas' next step, these zones would then add up to an independent right to freedom, which is to say, a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society. . . . We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future.

Indiana Law Review article at 9.

In fact, Judge Bork's suggestions that the right of privacy was not really about "privacy" as such, that this right would not be applied consistently, and that it would lead the Court into much more difficult moral and social issues, have all proved prophetic.

For example, Judge Bork explained that the "privacy" right recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973)—a right to terminate a pregnancy—is not really about privacy, but is more accurately described as a right to personal autonomy or liberty. Privacy refers to an interest in anonymity or confidentiality whereas liberty describes freedom to engage in a certain activity. The question in *Roe*, therefore, is whether any provision of the Constitution recognizes an individual right to terminate pregnancy against State intrusion. As Judge Bork testified, the Court's opinion in *Roe* made no attempt to ground such a right in the Constitution except to say that it was "founded in the 14th Amendment's concept of personal liberty and restrictions upon state action." *Id.* at 153

This is Judge Bork's difficulty with the opinion. As Justice White's dissent, joined by Justice Rehnquist, stated, there is "nothing in the language or history of the Constitution to support the Court's judgment,' which the dissent termed "an exercise of raw judicial power." The Due Process Clause of the Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." If the clause is read as written, then it guarantees that life, liberty, and property will not be taken without the safeguard of fair and adequate legal procedures to challenge the legality of the deprivation. Once such procedures have been given, and the legality of the deprivation established, the Due Process Class does not establish an independent barrier to the deprivation. If, on the other hand, the clause is read to protect liberty against deprivation regardless of procedures, then the judge must have a theory for deciding which liberties are protected and which are not since no one would suggest that all liberty is immune from state regulation.

Justice Scalia has also rejected the generalized substantive due process right to privacy. Significantly, as a Circuit Judge, Justice Scalia jointed Judge Bork's opinion in *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984), which held that there was no privacy right to homosexual conduct in the Navy, and which sharply criticized the Supreme Court's privacy decisions. The *Dronenburg* opinion stated:

> [W]hen the [Supreme] court creates new rights, as some Justices who have engaged in the process state that they have done, lower courts have none of the [ ] [constitutional and historical] materials available and can look only to what the Supreme Court has stated to be the principles involved.

741 F.2d at 1395.

And Justice O'Connor has also been consistently opposed to the expansive, generalized privacy right that some Justices have found in the Constitution. In her dessenting opinion in *City of Akron* v. *Akron Center for Reproductive health,* a case invalidating certain regulations on abortion procedures, she wrote:

> Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'"

Similarly, just last year in *Thornburgh* v. *American College of Obstetricians,* another case in which state regulations on abortion were invalidated, Justice O'Connor forcefully dissented, asserting that "[t]he Court's abortion decisions have already worked a major distortion in the Constitution." Moreover, her refusal to accept the privacy right is not limited to the abortion context. She also joined in Justice White's opinion in *Bowers* v. *Hardwick,* 103 S. Ct. 2481, 2505–06 (1983), finding that there is no constitutional right to privacy, consensual homosexual conduct. Thus, Justice O'Connor has never endorsed any application of a right to privacy in any context.

As Judge Bork stated before the Committee, it would be inappropriate for him to give any indication of how he would vote as a member of the Supreme Court should the issue arise again. But suffice it to say that the question would be one of searching for an appropriate constitutional basis and precedent. And as Judge Bork has stated, not every incorrectly decided constitutional decision should be open to reconsideration.

As Judge Bork has explained, no one has ever been able to explain why some liberties not specified in the Constitution should be protected and others should not. As far as the Constitution is concerned, when it does not speak to the contrary the State is free to regulate. A judge who uses the Due Process Clause to give substantive protection to some liberties but not others has no basis for decision other than his own subjective view of what is good public policy. That is what the debate is really about. Should unelected judges stick to their constitutionally assigned role of neutrally interpreting and applying the law, or should they bend and ignore the law according to their policy preferences in order to reach results they like?

We are not without historical precedents that show what happens when unelected judges attempt to encroach upon the legislature's proper sphere. Attempts to read substantive protections of liberty into the Due Process Clause have failed in the past precisely because the clause gives no indication of which liberties are to

be preferred to others. In the early part of this century, for example, the Supreme Court read the due process clause of the Fifth and Fourteenth Amendments to protect a generalized liberty of contract, and routinely struck down laws that interfered with that liberty. Thus, in *Lochner* v. *New York*, 198 U.S. 45 (1905), the Supreme Court invalidated a New York labor law limiting the hours of bakery employees to 60 hours a week. Similarly, in *Adair* v. *United States*, 208 U.S. 161 (1908), the Court struck down a Federal law prohibiting interstate railroads from requiring as a condition of employment that its workers agree not to join labor unions. and in *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), the Court held the District of Columbia's minimum wage law unconstitutional.

If the hearings former Secretary of HUD Carla Hills pointed out that Judge Bork's criticism of *Roe* and *Griswold* is based on his fear of a reneual of *Lochnerian* activism.

> Judge Bork with Justice Black and a great number of other distinguished constitutional scholars who have criticized the logic, not the result, in *Roe* and the *Griswold* cases, seek to avoid precisely that type [i.e. *Lochnerian* of activism.

As Judge Bork points out, the Supreme Court's modern attempts to use the Due Process Clause as a substantive protection of liberty have also been unconvincing. Although the Court has held in *Roe* that a woman has a constitutional right to receive an abortion, it has more recently held that consenting adults do not have a constitutional right to engage in homosexual sodomy. See *Bowers* v. *Hardwick*, 106 S. Ct. 2841 (1986). Justice White's opinion for the Court in *Bowers* reasoned as follows:

> It is obvious to us that neither ["the concept of ordered liberty" nor the liberties "deeply rooted in this Nation's history and tradition" formulation] would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.

Id. at 2844.

The difference between these two decisions illustrates Judge Bork's point that it is impossible to apply the undefined right of privacy in a principled or consistent manner. It is difficult to understand why abortion is a constitutionally protected liberty but homosexual sodomy is not. Neither activity is mentioned in the Constitution, both involve activity between consenting adults, and "[p]roscriptions against [both activities] have ancient roots."

Judge Bork said it this way at the hearings:

> [L]et me repeat about this created, generalized, and undefined right to privacy in *Griswold*. Aside from the fact that the right was not derived by Justice Douglas in any traditional mode of constitutional analysis, there is the: . . . we do not know what it is. We do not know what it covers. It can strike at random. *For example the Supreme Court has not apply the right of privacy consistently and I think it is safe to predict that the Supreme Court will not.* For exam-

> ple, if it really is a right of sexual freedom in private, as some have suggested, then *Bowers* v. *Hardwick*, which upheld a statute against sodomy as applied to homosexuals, is wrongly decided. Privacy to do what, Senators? You know, privacy to use cocaine in private? Privacy for businessmen to fix prices in a hotel room? We just do not know what it is. (Emphasis added.)

Some have said that the principle may be that individuals have a constitutional right to use their bodies as they wish. Not only is this principle to be found nowhere in the Constitution, but also its application would invalidate laws against prostitution, consensual incest among adults, bestiality, drug use, and suicide, not to mention draft laws and countless safety measures such as laws requiring the use of seat belts and motorcycle helments. This principle is thus far too general to support a particular decision without sweeping in these other cases. Unless the American people decide that judges should be given far more authority and responsibility for running our society, the Construction requires that they follow the law.

As Carlos Hills said at the hearings:

> I know that his criticism of *Griswold* was based upon its rationale. I know that he is concerned as a judicial activist with a vast undefined right of privacy, fearing that it removes the discretion from the elected bodies to a small group of judges who are unelected.

Many of the most respected constitutional law scholars have expressed profound disagreement with the reasoning and holding of *Roe* v. *Wade*, the leading example of substantive due process. These include Harvard Law School Professors Archibald Cox and Paul Freund, Stanford Law School Dean John Hart Ely, and Columbia Law School Professor Henry Monaghan. Dean Ely, a former law clerk to Chief Justice Earl Warren, stated in 1973 that

> what is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the Framers' thinking respecting the specific problem in issues, any general value derivable from the provisions they included or the nation's governmental structure.

Similarly, Stanford Law School Professor Gerald Gunther, editor of the leading law school casebook on constitutional law, offered the following related comments on *Griswold* v. *Connecticut*:

> It marked the return of the Court to the discredited notion of substantive due process. The theory was discredited in 1937 in the economic sphere. I don't find a very persuasive difference in reviving it for the personal sphere. I'm a card-carrying liberal Democrat, but this strikes me as a double standard.

Some witnesses have urged the Ninth Amendment as a basis for invalidating State laws that restrict liberty or privacy not otherwise protected in the Constitution. As Judge Bork has explained, the Ninth Amendment provides no basis for doing so. The Ninth Amendment provides: "The enumeration in the Constitution, of

certain rights, shall not be construed to deny or disparage others retained by the people." The historical meaning of this amendment is revealed by the circumstances of its adoption. The original Constitution did not contain a Bill of Rights. Rather, it established a National Government of enumerated powers. But during the ratification debates, calls were made with increasing frequency by the so-called Anti-Federalists for adoption of a Bill of Rights. The Federalists raised two objections to inclusion of a Bill of Rights. First, it was said to be unnecessary because Congress would have no power to abridge fundamental rights of the people as the general government was one of enumerated, and therefore limited, powers. Second, the Bill of Rights was said to be dangerous because the reservation of certain rights might be read to imply that power was given to the Federal Government to regulate all others.

When James Madison became convinced of the need for a Bill of Rights, he defended his proposal as follows:

> It has been objected also against the bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I ever heard urged against the admission of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution. (1 Annals of Congress 456 (J. Gales & W. Seaton ed. 1834)).

The clause to which Madison referred was the provision that would later be adopted in somewhat shorter form as the Ninth Amendment. Thus, it appears that the amendment's instruction that the enumeration "of certain rights, shall not be construed to deny or disparage others retained by the people" was meant to prevent any implication, as Madison put it, "that those rights which were not singled out, were intended to be assigned into the hands of the General Government."

This means that whenever the Constitution does not grant the *power to regulate* conduct to the Federal Government, the people have a right to engage in that conduct free from *Federal* interference even though the conduct is not specified in the Bill of Rights. It must be emphasized that the "right" protected by the Ninth Amendment runs against the Federal Government when it undertakes to regulate individuals through an unwarranted expansion of its powers. For this reason, it makes little sense either textually or historically to speak of Ninth Amendment rights enforceable against the *States*. As Judge Bork has said elsewhere, if that were the meaning of the Ninth Amendment, then surely there would have been heated debate in the State ratifying conventions, and litigants and courts would have invoked the amendment in that capacity. That neither occurred is strong evidence that the amendment was not intended to create federally enforceable rights against the States.

Moreover, Judge Bork correctly states that even if one agrees with the recent suggestion that the Ninth Amendment protects natural rights against State and Federal intrusion, the nature and scope of those rights is undefined and virtually limitless. For example, John Locke, whose writings profoundly influenced the framers' view of "natural rights," regarded property and contract rights as among the most important natural rights of men. Accordingly, if the Ninth Amendment were to be interpreted as a grant of liberty against Government intrusion, it would necessarily include the freedom of contract. Of course, this would lead to invalidation of the worker protection legislation struck down by *Lochner* and its progeny, or any other form of economic regulation that hampers the "right" to contract.

Alternatively, members of the Supreme Court have invoked their own notions of natural law in the past. For example, Justice Bradley's concurrence in *Bradwell* v. *State*, 83 U.S. 130 (1873), upholding a law forbidding women from practicing law, states:

> The natural and proper timidity and delicacy which belongs to the female evidently unfits it for many of the occupations of civil life. . . . [The] paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

But those who now urge reliance on the Ninth Amendment see a different set of natural rights emanating from the Ninth Amendment. For example, Professor Tribe filed a brief with the Supreme Court in *Bowers* v. *Hardwick* suggesting that one of the rights "retained by the people" under the Ninth Amendment is the right to engage in homosexual sodomy. Equally plausible are claims that the Ninth Amendment protects drug use, mountain climbing, and consensual incest among adults. Certainly the text of the amendment makes no distinction among any of these "rights." Therefore, unless the Ninth Amendment is to be read to invalidate all laws that limit individual freedoms, judges who invoke the clause selectively will be doing nothing more than imposing their subjective morality on society. The Constitution nowhere authorizes them to do so.

Although Justice Goldberg's concurrence in *Griswold* invoked the Ninth Amendment, Judge Bork has explained that the problems just discussed are probably the reason why the Supreme Court has *never* rested a decision on the Ninth Amendment. For instance, even Justice Douglas, the author of the majority opinion in *Griswold*, stated in a concurring opinion in the companion case to *Roe* v. *Wade*, that "The Ninth Amendment obviously does not create federally enforceable rights." *Doe* v. *Bolton*, 410 U.S. 179, 210 (1973) (Douglas, J., concurring). Unless someone can find a way both to read the Ninth Amendment to apply against the States and to discover which additional rights are retained by the people, there is no principled way for a judge to rely on the clause to invalidate State laws.

There is an additional matter that requires mentioning. There appears to be some confusion concerning Judge Bork's view of, and the Court's decision in, *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). *Skinner* held that a State statute requiring sterilization of recidi-

vist robbers but no embezzlers worked "a clear, pointed, unmistakable discrimination," *id.* at 541, and therefore violated the equal protection clause of the Fourteenth Amendment. It is important to understand the rationale given by the Court for its decision. The Court did *not* rely on a substantive due process right to privacy. In fact, the Court declined Chief Justice Stone's invitation in a separate concurrence to decide the case under the due process clause. Instead, the Court rested its decision squarely on the Equal Protection Clause: "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Id.*

In his 1971 article, Judge Bork was critical of what he believed to be the Supreme Court's inconsistent application of the Equal Protection Clause. He cited six cases as examples in which the Court both upheld and invalidated challenged classifications. One of the cases Judge Bork cited was *Skinner* v. *Oklahoma*. He did not cite *Skinner*, or any other case listed, for the correctness or incorrectness of its holding. Rather, Judge Bork's point was merely that it appeared that "the differing results cannot be explained on any ground other than the Court's preferences for particular values." (Indiana Law Review at 12.) This was the sum total of Judge Bork's "criticism" of *Skinner*, and it is a mischaracterization to suggest that Judge Bork's inclusion of *Skinner* in a string cite means that he disagrees with the decision in the case:

> In his testimony, Judge Bork pointed out that the statute in question made a distinction between a robber and an embezzler and, with respect to that distinction, if the *Skinner* decision "had gone on and pointed out those distinctions really sterilized, in effect, blue-collar criminals and exempted white-collar criminals, and indeed, appeared to have some taint of a racial bias to it, [Douglas] could have arrived at the same decision in what I would take to be a more legitimate fashion."

In addition, Judge Bork noted that sterilization of criminals raises serious and independent questions under the Eighth Amendment's prohibition on cruel and unusual punishment, questions neither Judge Bork nor the Court addressed. In short, there is no reason to believe that Judge Bork would have any disagreement with the result reached by the Court in *Skinner*.

THE FIRST AMENDMENT

Judge Bork's testimony fully established that he would vigorously defend first Amendment freedoms. Judge Bork's judicial record plainly demonstrates his powerful solicitude for the freedom of speech and the press. His testimony also answered the concern expressed by some about a theoretical position on the first amendment that he arrived at when he was a law professor in 1971. See Bork, *Neutral Principles and Some First Amendment Problems,* 47 Ind. L.J. 1 (1971). Judge Bork's testimony established that he had long ago publicly abandoned the aspect of his theory that some found most troubling—namely, that the first Amendment protects only "explicitly political" speech though he reaffirmed his view

that obscenity is unprotected. With respect to his strong criticism of the Holmes/Brandeis "clear and present danger test" for determining when the government can regulate speech advocating violent overthrow of the government or law violation, Judge Bork emphasized that his principle theoretical objection was with Holmes' rationale and that his objection to the test itself, as refined in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), was one of degree. Judge Bork also indicated that he was sufficiently comfortable with *Brandenburg* that he would accept it as being within a firmly established line of precedent that cannot be disturbed. In sum, Judge Bork affirmed the position that he accepts and would vigorously implement the current corpus of first Amendment doctrine.

Judicial Record

As the hearings clearly revealed, Judge Bork's judicial record on the first Amendment demonstrates that, as an Associate Justice of the U.S. Supreme Court, Robert H. Bork would be a consistent and implacable foe of censorship. Judge Bork's opinions indicate that he would afford the press and broadcast media protection from censorship to a degree which sometimes exeeds under prevailing Supreme Court doctrine. His judicial writings also reveal a broad view of the coverage afforded by the first Amendment, notwithstanding earlier professional utterances to the contrary. Judge Bork's opinions show that his decisions are indifferent to any sympathy or hostility that he may feel toward the message or speaker at issue; he will permit no regulation of speech unless, consistent with Supreme Court precedent, the law is narrowly tailored to serve a compelling governmental interest.

Judge Bork's concurrence in *Ollman* v. *Evans,* 750 F.2d 970 (D.C. Cir. 1984), is perhaps his most celebrated first Amendment opinion. This libel case is particularly important because it describes not only Judge Bork's first Amendment philosophy, but also his readiness to apply constitutional values to new threats that the Framers could not possibly have foreseen. In *Ollman,* Judge Bork's opinion was issued over a dissent by Judge (later Justice) Scalia, who stated: "It seems to me that the concurrence embarks upon a course of, as it puts it, constitutional 'evolution,' with very little reason and with very uncertain effect upon the species." *Ollman* v. *Evans,* 750 F.2d 971, 1036 (1984) (Scalia J., dissenting). Thus, Judge Scalia, whom this Committee and the full Senate unanimously approved for Associate Justice one year ago, sharply criticized Judge Bork for taking too *expansive* a view of individual liberties protected by the Bill of Rights. In *Ollman,* Judge Bork stated:

> We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave unto our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be at the core of those clauses. Perhaps the framers did not evision the libel action as a major threat to that freedom. . . . But if, over time, the libel action becomes a threat to the central meaning of the

first amendment, why should not judges adapt their doctrines?

Id. at 996. Applying the constitutional value found in the first Amendment to modern circumstances, Judge Bork concluded that, while existing Supreme Court decisions had already established some safeguards to protect the press from the chilling effect of libel actions, "in the past few years, a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment would most certainly prohibit." *Id.* Accordingly, Judge Bork held that the lawsuit should be dismissed on the first amendment ground that the circumstances surrounding the allegedly defamatory statements showed them to be mere "rhetorical hyperbole" and therefore not actionable. *Id.* at 1010.

The *Ollman* opinion was hailed by liberal columnist Anthony Lewis as "an extraordinarily throughtful judicial opinion." Lewis, *Freedom Not Comfort,* New York Times, Dec. 10, 1984, at A23. Similarly, libel lawyer Bruce Sanford said of Judge Bork's concurrence: "There hasn't been an opinion more favorable to the press in a decade." *Ollman* amply demonstrates that Judge Bork does not look for or mechanically apply the precise intentions of the Framers in applying his philosophy of originalism, but instead takes a broad view of the Framers' understanding of what they were protecting in the Bill of Rights. His opinion in *Ollman* also refutes the notion that his circuit court decisions are somehow not accurate indications of how he would decide cases as a Supreme Court Justice, because, perceiving a threat to a constitutional value contained in the Bill of Rights, Judge Bork went *well beyond* what Supreme Court precedent required in protecting the press from harassing libel actions. (See statement of Professor Michael McConnel, University of Chicago Law School.)

Similarly, while closely adhering to precedent, Judge Bork's opinions have shown that he believes that the Supreme Court has not gone far enough in protecting the broadcast media from government censorship. Prevailing Supreme Court case law has made an explicit distinction between the print media, the editorial content of which cannot be regulated, see *Miami Herald* v. *Tornillo,* 418 U.S. 241 (1974), and the broadcast media, the editorial decisions of which may be regulated according to such federal policies as the fairness doctrine and the requirement that persons criticized on the air be given a right to reply. (*Red Lion* v. *FCC,* 395 U.S. 367 (1969).) The distinction drawn by the Supreme Court rests on the so-called "scarcity doctrine," holding that the broadcast media, unlike the printed press, operate over scarce airwaves, and the fact of scarcity permits government regulation of the airwaves as a public trust.

In *Telecommunications Research & Action Center* v. *FCC,* 801 F.2d 501 (D.C. 1986), Judge Bork faced a challenged to the Federal Communication Commission decision holding that teletext, a textual medium broadcast over a previously unused portion of the airwaves, could not be subject to government regulation because it

was akin to a print medium. Scrupulously adhering to precedent with which he disagreed, Judge Bork, joined by Judge (later Justice) Scalia, held that because teletex was broadcast over scarce public airwaves, *Red Lion*'s scarcity doctrine necessarily governed. At the same time, however, applying the first amendment to modern, real life circumstances, Judge Bork argued that there was no principled way to distinguish print from broadcast media based on the scarcity of communications resources and, therefore, that *Tornillo* should preclude any government control over the editorial content of broadcasting. Judge Bork has repeated in other cases, as well, the theme that the editorial decisoons of broadcasters deserve more protection than currently afforded by prevailing Supreme Court opinions, although he has consistently and rigorously adhered to controlling precedent. See, *e.g., Branch* v. *FCC,* 824 F.2d 37 (D.C. Cir. 1987); *Loveday* v. *FCC,* 707 F.2d 1443 (1983).

Although an examination Judge Bork's theoretical views on the protections afforded by the first Amendment to nonpolitical speech will be reserved for a later discussion, it is also worth noting that his opinions on the D.C. Circuit demonstrate that, notwithstanding the position taken in Professor Bork's 1971 *Neutral Principles* article, Judge Bork has now embraced the more expansive, prevailing view of the scope of the first amendment. For example, in *McBride* v. *Merrell Dow & Pharmaceuticals, Inc.,* 717 F.2d 1460 (D.C. Cir. 1983), Judge Bork vigorously applied first amendment protections against harassing libel actions in the context of *scientific* speech. In *Brown & Williamson Tobacco* v. *FTC,* 778 F.2d 35 (D.C. Cir. 1985), Judge Bork, joined by Judge Scalia and Judge Edwards, vacated an injunction against false and deceptive cigarette *advertising* because it prohibited an extremely narrow class of advertisements that the court concluded would not be deceptive under the government's theory. In *Quicy Cable TV* v. *FCC,* 768 F.2d 1434 (D.C. Cir. 1985), Judge Bork joined Judge J. Skelly Wright's opinion invalidating a regulation requiring cable television operators to carry *general television programming* of local broadcasters.

Judge Bork has also taken a broad view of the kinds of entities subject to the first amendment. (Statement of Professor Michael McConnel, University of Chicago Law School.) Thus, in *Reuber* v. *United States,* 750 F.2d 1039 (D.C. Cir. 1985), Judge Bork filed a concurring opinion agreeing with his colleague Judge Wald that the first Amendment applied to the conduct of a private corporation which, at the behest of the federal government, dismissed an employee for remarks critical of the government. Judge Starr, a Reagan appointee to the D.C. Circuit, dissented. This expansive reading of the first Amendment's applicability occurred, moreover, in the context of a dispute involving *scientific* speech. This decision confirms that, notwithstanding some suggestions to the contrary at the hearings, Judge Bork's circuit court opinions do provide a reliable indicator of the kind of Justice he would be, for the application of the first amendment to private parties in this manner was an issue that the Supreme Court had never had occasion to address.

Judge Bork's opinions also established his open-mindedness and lack of result orientation by exhibiting an impartiality with respect to the claimant or message for which first Amendment protection

is sought. In *Lebanon* v. *Washington Metropolitan Transit Authority,* 749 F.2d 893 (D.C. Cir. 1984), for example, Judge Bork, joined by Judge Scalia and Judge Starr, ordered the Washington, D.C. subway system to lease space to an artist to display a poster highly critial of the President Reagan and members of his administration. He held that the subway authority's decision not to lease the space requested was based on a judgment about the content of the message and that the authority's action amounted to an impermissible prior restraint on free speech. After "an independent examination of the whole record," Judge Bork rejected the subway authority's defense that it was suppressing the poster because it was deceptive, going beyond his D.C. Circuit colleagues to protect free expression. (Statement of Professor Michael McConnel, University of Chicago Law School.)

Along the same lines, in *Finzer* v. *Barry,* 798 F.2d 1450 (1986), cert. granted, 107 S. Ct. 1282 (1987) Judge Bork rejected the first Amendment claim of a conservative group that was seeking to picket the Soviet and Nicaraguan embassies. The law at issue was an act of Congress prohibiting hostile demonstrations within 500 feet of a foreign embassy. Some concern was expressed about this opinion because the regulation upheld made distinctions about permissible speech based on the viewpoint expressed—that is, based on whether the demonstration was hostile or friendly to the foreign country. Judge Bork's opinion emphasized that making distinctions about permissible speech on the basis of viewpoint would only very rarely be constitutional, but that, in the extremely limited circumstances presented in *Finzer,* such a distinction was narrowly tailored to the compelling governmental interest of protecting the safety, peace, and dignity of foreign emissaries, an essential predicate to ensuring the safety and well-being of our own emissaries in foreign countries.

Moreover, as was pointed out, Judge Bork undertook a careful historical analysis of the treatment of foreign emissaries at the time of the adoption of the Constitution and Bill of Rights, as well as evidence of subsequent scholarly writings and government action in this area, before determining that the original understanding of the Constitution allowed for Congress to meet its obligation under the law of nations to protect foreign embassies from insult. See Hearings, 9/17/87 at 145–46. Moreover, Judge Bork also made it quite clear that he would have reached a different conclusion had the claimants presented evidence that the authorities were engaging in the "selective enforcement" of the law against disfavored groups. Judge Bork stated: "There was no allegation of selective enforcement in *Finzer* v. *Barry.* . . . Nobody attacked the law on grounds of selective enforcement. That would have been a different case." Finally, it is crucial to understand that the law sustained in *Finzer* does not prohibit or suppress criticism of foreign countries, but merely limits it to contexts outside the immediate vicinity of foreign embassies and consulates. People can say whatever they want, hostile or otherwise, about any foreign country; they simply cannot do it within 500 feet of its embassy. In sum, the opinion represents an extremely thoughtful and narrow treatment of a highly complex and close question of law.

Finally, the Supreme Court's treatment of Judge Bork's First Amendment decisions on the D.C. Circuit confirms that his views are consistent with prevailing jurisprudence in this area. Although the Supreme court has not yet considered any case in which Judge Bork wrote a majority opinion, *certiorari* has been granted in *Finzer* v. *Barry,* 798 F.2d 1450 (1986), cert. granted, 107 S. Ct. 1282 (1987), and a decision is expected this Term. The Supreme Court has also granted *certiorari* in *Abourezk* v. *Reagan,* 785 F.2d 1043 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 666 (1986), an opinion in which Judge Bork dissented from a holding that the executive branch did not have statutory authority to exclude aliens on the basis of their political beliefs. The case turns exclusively on this administrative law question, because the Supreme Court, in an opinion by Justice Blackmun, has already conclusively decided that the first amendment permits Congress to exclude aliens based on their political beliefs. See, *e.g., Kleindienst* v. *Mandel,* 408 U.S. 770 (1983). The Court has agreed with the First Amendment position taken by Judge Bork in the two instances in which it has reviewed his disposition of First Amendment issues. First, the Supreme Court reviewed the *en banc* decision of the D.C. Circuit in *Community for Creative Non-Violence* v. *Watt,* 703 F.2d 586 (D.C. Cir. 1984), and, in an opinion by Justice White, joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, Stevens, and O'Connor, agreed with the dissenting position taken by Judge Bork, Judge Scalia, and several others. See *Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288 (1984). Second, in *Block* v. *Meese,* 793 F.2d 1303 (D.C. Cir. 1986), Judge Bork and Judge J. Skelly Wright joined Judge Scalia's opinion holding that the Federal Government could constitutionally require the registration of certain foreign-sponsored films as "political propaganda." Although the D.C. Circuit decision was not reviewed by the Supreme Court, the Court heard an identical case from another Federal court reachng the opposite conclusion about the exact same films, and six of the eight Justices hearing the case (Justice Scalia recused himself) voted to adopt the position taken in the D.C. Circuit opinion joined by Judge Bork. See *Meese* v. *Keene,* 107 S. Ct. 1862 (1987).

Political Speech

Judge Bork's testimony fully answered the concern that some members of the committee expressed regarding his earlier, professorial position that the First Amendment applied only to "explicitly political" speech. See Bork, *Neutral Principles,* 47 Ind. L.J. at 27–28. First, he had long since publicly abandoned that strict, theoretical view of the First Amendment in favor of a theory that encompassed a considerably wider variety of communicative expression. (Hearings, 9/16/87 at 95–97, 109–110.) Second, to the extent that any difference remained between his present theoretical posture and prevailing first amendment doctrine, Judge Bork indicated: "There is now a vast corpus of First Amendment decisions, and I accept those decisions as law, and I am not troubled by them." (Hearings, 9/17/87 at 20.)

Professor Bork's 1971 article started with the proposition that the command of the first amendment—"Congress shall make no

Law . . . abridging the freedom of speech"—cannot be absolute. *Neutral Principles*, 47 Ind. L.J. at 21. Any such reading, he argued, would lead to such absurd results as forbidding Congress "to prohibit incitement to mutiny abroad a naval vessel engaged in action against the enemy, to prohibit harangues from the visitors' gallery during [Congress'] own deliberations, or to provide any rules of decorum in federal courtrooms." *Id.* Other examples of unprotected speech readily suggest themselves, such as an agreement among businessmen to fix prices, a conspiracy to assassinate a federal official, or, to borrow an example from Justice Holmes, shouting "fire" in a crowded theater. Accordingly, in order to discern the constitutionally protectible element of speech, Professor Bork sought to derive a neutral principle that would distinguish First Amendment "speech" from other human activities and forms of personal gratification. He found that the political function of speech—to quote Justice Brandeis, "the discovery and spread of political truth"—was the one aspect of speech "different from any other form of human activity." *Id.* at 26. He also believed that the necessity of free and robust political speech could be derived from the representative form of our constitutional democracy. Thus, Professor Bork's asserted that "the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment." 47 Ind. L.J. at 23. This view should answer the concern of those who suggested that, as a Justice, Judge Bork would rely solely on the text of the Constitution to discern basic constitutional liberties. He therefore concluded that only "explicitly and predominantly political speech" should be protected. *Id.* Professor Bork noted that "[t]he practical effect of confining constitutional protection to political speech would probably go no further than to introduce regulation or prohibition of pornography." *Neutral Principles*, 47 Ind. L.J. at 28.

Even in 1971, Professor Bork described the theories expressed in his article as "informal," "tentative," and "exploratory," intended to be "ranging shots" and "speculations." At the hearings, Judge Bork indicated that he had long ago abandoned his strict 1971 view on the first amendment. He explained: "I tried to follow a bright line. The bright line, I have become convinced, particularly since sitting on first Amendment cases on the court, the bright line is impossible."

Robert Bork's earlier public pronouncements confirm that this movement away from his early view occurred well before his nomination to be an Associate Justice of the U.S. Supreme Court. When asked about an interview in a 1985 edition of the *Conservative Digest*, in which he states: "I finally worked out a philosophy which is expressed pretty much in that 1971 *Indiana Law Journal* article that you have probably seen." Judge Bork explained that this remark was a reference to the first part of that article, which outlined the *theory of a general judicial philosophy* to which he still adheres, rather than to the second part of the article, which dealt with the first Amendment. The theory upon which he ultimately settled begins at the same starting point—the first Amendment protects discourse about the manner in which we as a society

order our own affairs—but abandons the bright line approach that protects only speech which is "explicitly political." Instead, it would protect broad classes of speech because they feed the democratic process of self-governance. Thus, in the ABA Journal in January 1984, Judge Bork explained: "As the result of the responses of scholars to my [1971] article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection. I have repeatedly stated this position in my classes." Bork, "Judge Bork Replies," 70 *ABA Journal* 132 (Feb. 1984). Judge Bork added: "I continue to think that obscenity and pornography do not fit this rationale for protection." During the hearings, Judge Bork was asked about his use of the terms "obscenity" and "pornography." Judge Bork stated that his academic writings employ the terms interchangeably. To the extent that the Supreme Court has drawn a technical legal distinction between (unprotected) obscenity and (protected) pornography, Judge Bork indicated in his testimony that his use of the two terms interchangeably was an imprecise use of language. Similarly, in a radio address on June 10, 1987, Judge Bork stated that other forms of speech may "feed[] directly into the political process" and that "political speech—speech about public affairs and public officials—is the core of the amendment, but protection is going to spread out from there . . . [into] moral speech and scientific speech, into fiction and so forth." (Worldnet, U.S. Information Agency, *Bicentennial of the U.S. Constitution* at 24-25 (June 10, 1987) ("Worldnet Interview"). This change in emphasis from a bright line theory apparently had occurred as early as 1973, for in his confirmation hearings to be Solicitor General, Professor Bork took the position that political speech was "the core of the first amendment," and "as you move out from there the first amendment's claims may still exist but certainly by the time . . . they reach the area of pornography, and so forth, the claim of first amendment protection becomes more tenuous." *Nominations of Joseph T. Sneed to Be Deputy Attorney General and Robert H. Bork to Be Solicitor General,* Hearings Before the Committee on the Judiciary, United States Senate, 93rd Congress, 1st Sess. at 12 (1973). The line would be drawn at the point when "the speech no longer has *any relation* to those processes" by which we govern ourselves and becomes "purely a means for self-gratification." (Worldnet Interview at 25) Although this line cannot be identified with "great precision," Judge Bork's theory would clearly put "forms of art . . . which are pornography and things approaching it" in the unprotected category. *Id.* at 25, 26-27. Judge Bork clarified his position that a court must examine all material that the community tries to suppress as obscene and make a judgment whether in fact the material meets the legal definition of obscenity.

This theory is compatible with the Supreme Court's prevailing first Amendment doctrine. As Justice Brennan stated for the Court in *FCC* v. *League of Women Voters,* 468 U.S. 364 (1984), the "form of speech which the Framers of the Bill of Rights were most anxious to protect [was] speech that is 'indispensible to the discovery and spread of political truth.' " *Id.* at 383 (quoting *Whitney* v. *California,* 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). Thus, Judge Bork's theory of the first amendment and current Supreme

Court doctrine begin at the same core of political speech and then spread out to other protected areas. Consistent with Judge Bork's theoretical construction of the first Amendment, the Supreme Court has taken pains to relate first Amendment protections to society's self-governance in the broader sense. For example, in *Virginia State Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 764–65 (1976), the one major recent case in which the Supreme Court extended first Amendment protections to an area—commercial speech—that had previously been held to be unprotected, the Court explicitly sought to relate such speech to matters of public interest and to the way society runs its free enterprise system. Employing similar reasoning, Solicitor General Bork argued in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), that a prohibition against attorney advertising was unconstitutional because it burdened the right of citizens to obtain meaningful access to the courts. As with Judge Bork's theory, moreover, the Supreme Court has clearly indicated that the expanse of the first Amendment is not limitless, a notable example being that it stops short of protecting obscenity. See, *e.g., Miller* v. *California,* 413 U.S. 15 (1973).

Thus, any difference between the current state of first Amendment jurisprudence and the academic theory to which Judge Bork ascribes comes down to a matter of degree. It may well be that certain forms of art and literature—pornography, for example—fall on the side of pure self-gratification and consequently have nothing to do with the way in which we govern ourselves. See Worldnet Interview at 26–27. To the extent that Judge Bork might have difficulty drawing this line, that does not differentiate him in any way from the Supreme Court in its attempts to draw the line where material becomes obscene and therefore unprotected. Indeed, Justice Stewart, in a moment of sincere frustration, summarized the mode of analysis by which the Court grapples with this difficult question as applying the standard: "I know it when I see it." *Jacobellis* v. *Ohio,* 383 U.S. 413 (1966) (Stewart, J., concurring). But much of art and literature does feed the democratic process. As noted, during a radio interview prior to his nomination to be an Associate Justice, Judge Bork affirmatively stated that, under his academic theory, the first Amendment extends to "fiction," (Worldnet Interview at 25) and, in his testimony he cited the social satire of Henry Miller's *Tropic of Capricorn* as coming within his academic view of first amendment protections. "[I]f you read *The Tropic of Capricorn* by Henry Miller, you find a lot of stuff in there that is really political—criticism of the establishment and so forth. So that those things would be protected." (Hearings, 9/17/87 at 19.) Along these lines, concern was expressed that the novel, *Fanny Hill,* might not merit protection under Judge Bork's academic theory because the book "contains no political ideas whatsoever." (Hearings, 9/22/87 at 212). This simply misses the point; a work does not have to "contain" a political idea to warrant protection, but merely has to feed the democratic process by contributing to society's processes of critical self-examination. *Fanny Hill,* properly viewed as commentary about a particular stratum of our society, plainly qualifies for protection under such a rationale.

With respect to art, as well, protection is plainly not absent under the academic theory to which Judge Bork has ascribed over the years. It was noted in the hearings, for example, both the enormous relevance that the Bauhaus movement in art had for the political culture in Weimar Germany and the urgency with which the Nazis suppressed it. Such art would undoubtedly qualify for protection under Robert Bork's professorial view of the free speech guarantee. By contrast, the kind of "art" that his writings and speeches has repeatedly and paradigmatically excluded from first Amendment protection is pornography and obscenity. See, *e.g., Neutral Principles,* 47 Ind. L.J. at 29; *The Individual, the State, and the First Amendment* 15–17 (1979) ("University of Michigan Speech"); Bork, "Judge Bork Replies," 70 *ABA Journal* 132 (Feb. 1984); Worldnet Interview at 26–27. In this respect, a question posed about the Joffrey Ballet is useful in pinpointing the real area of theoretical controversy. Whether the Joffrey Ballet would be protected under a pure application of Judge Bork's academic theory is a question of line drawing the difficulty of which he has readily conceded, but the point is that the American people are not going to ban the Joffrey Ballet. Some local communities in this nation may well choose to ban nude dancing, however, and, as Judge Bork stated during his testimony, his view of the first Amendment would let these communities, through the political process, express their views on nude dancing.

Judge Bork's scholarly position on the Supreme Court's treatment of obscene speech in *Cohen* v. *California*, 403 U.S. 15 (1971), was also discussed during the hearings. Over the dissent of Justice Blackmun, joined by Chief Justice Burger and Justice Black, that case overturned the conviction of a person who wore into a courthouse a jacket emblazoned with an expletive directed at the military draft. Judge Bork's academic criticism of *Cohen* takes issue with the following reasoning of the majority opinion: "[W]hile the particular four-letter word being litigated is perhaps more distasteful than others of its genre, it is nevertheless often true that one man's vulgarity is another man's lyric." See University of Michigan Speech at 17–18; and (Hearings, 9/18/67 at 288). Professor Bork's objection is to the notion that the Constitution prohibits a community from expressing the moral judgment that disruptive obscenities are not to be uttered in its courts of law, especially when the "idea" carried by the obscenity can be expressed in other ways. The Supreme Court has apparently come to agree with the general principle that the Constitution does not invalidate all such moral judgments, for in *Federal Communications Commission* v. *Pacifica Foundation*, 438 U.S. 726 (1978), the Court permitted the FCC to sanction a radio station for broadcasting profane language, and in *Bethel School District* v. *Fraser*, 106 S. Ct. 3159 (1986), the Court permitted a school to discipline a student for using profanity in a school speech. Indeed, during the hearings Professor Laurence Tribe of Harvard, while maintaining that *Cohen* was correctly decided on a technical issue of first Amendment law, agreed with the position that the use of certain offensive language may be suppressed as inconsistent with the decorum of a courtroom or, indeed, of the Senate.

Thus, it is clear that to the extent that Judge Bork's academic, professorial view of the scope of the first Amendment differs at all from that of prevailing doctrine, the difference is at most marginal. Any such difference is mitigated, moreover, by Judge Bork's philosophy of judging, as expressed in *Ollman* v. *Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984), which prescribes the adaptation of constitutional provisions such as the first Amendment to protect conduct that the framers did not envision protecting when such a course becomes necessary to preserve a value central to the Constitution. Thus, to the extent that Judge Bork has acknowledged that the first Amendment's "outer reach and contours are ill-defined," *id.* at 995, such communicative conduct as art, literature, scientific speech, moral speech, and the like may well qualify for protection even at the margins, if for no other reason than to ensure the preservation of the values that they might add to public discourse. In any case, to the extent that any marginal differences may exist between Judge Bork's academic perspective on the first Amendment and the doctrinal status quo, Judge Bork stated in his confirmation hearings that he views existing first Amendment doctrine as being so deeply embedded in the fabric of our society and our law that he accepts it as settled precedent and feels comfortable giving it a full and fair application. Judge Bork stated:

> I certainly have no desire to go running around trying to upset settled bodies of law which are not, to say the least, pernicious. . . . I would accept that line of First Amendment cases gladly, not grudgingly.

Clear and Present Danger Test

During the hearings, several members of the Committee questioned Judge Bork about his views on the application of the first amendment to speech advocating the violent overthrow of the government or the violation of the law. In this *Neutral Principles* article, 47 Ind. L.J. at 30–35, Professor Bork criticized the approach of Justices Holmes and Brandeis, which would permit the suppression of such advocacy only when there was a "clear and present danger" of immediate serious violence. See *Whitney* v. *California*, 274 U.S. 357, 376 (1927) (Brandeis, J., with whom Holmes, J. joined, concurring); see also *Gitlow* v. *New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., with whom Brandeis, J. joined, dissenting). Professor Bork's article also criticized the prevailing test adopted in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), which permits the suppression of "advocacy of the use of force or law violation [only] where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Professor Bork's critique of these cases was two-fold. First, at a philosophical level, he rejected the Holmesian notion that speech which would ultimately set aside the results of political speech and destroy the marketplace of contending ideas had protectible value in our republican system of government. Second, at a practical level, he believed that requiring a close nexus between the advocacy and the harm gave the courts power to make judgments more appropriately left with the political branches. During his testimony before this committee, Judge Bork indicated that he still believes that the

Holmesian rationale for the clear and present danger test is misguided, but that he no longer has any deeply felt practical objection to the *Brandenburg* test and accepts it as settled precedent.

. In close questioning about his current views on *Brandenburg* and the clear and present danger test, Judge Bork reiterated his skepticism of Justice Holmes' position that speech which would lead to the forcible destruction of our republican sytem of government had protectible first amendment value. As a law professor, Judge Bork had sharply disagreed with Justice Holmes' famous statement that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, then the only meaning of free speech is that they should be given their chance and have their way." In a 1979 speech, he noted a logical fallacy in Holmes' argument—that is, if the "dominant forces in the community" did believe in proletarian dictatorship, it would not have to be instituted through the violent action of a minority. (University of Michigan speech at 20.) Judge Bork reiterated this view at the hearings. Second, he believed, and continues to believe, that the first Amendment does not require our republican system of government to tolerate the forces of its own destruction. *Id.* at 20, 21; *Neutral Principles,* 47 Ind. L.J. at 32.

This view is widely shared. For example, Justice Felix Frankfurter, writing for the Court in *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 96 (1962), wrote that construing the first amendment to preclude resistence against subversion of our system of government "would make a travesty of that amendment and the great ends for the well-being of our democracy that it serves." Similarly, in *Dennis* v. *United States,* 183 F.2d 202, 212/13 (1950), *aff'd,* 341 U.S. 494 (1951), Judge Learned Hand wrote: "The advocacy of violence may, or may not, fail; but in neither case can there be any 'right' to use it. Revolutions are often 'right,' but a 'right' of revolution is a contradiction in terms, for a society which acknowledged it, could not stop at tolerating conspiracies to overthrow it, but must include their execution." Yale Law Professor Alexander M. Bickel, who argued the *Pentagon Papers* case for the New York Times, echoed these sentiments in *Morality of Consent* 72 (1975). There is no indication that *Brandenburg* relies on the Holmesian rationale rejected by Professor Bork.

Given this fact, the practical difference between Judge Bork's academic position and that adopted in *Brandenburg* is merely one of degree. Both Judge Bork's academic position and *Brandenburg* recognize the legitimacy of society's protecting itself from violence and lawlessness. *Brandenburg,* however, requires a relatively close nexus between the harm sought to be prevented and advocacy of that harm before a legislature may suppress such advocacy. Professor Bork's academic position was that such judgments about the advocacy of lawlessness and forcible overthrow are "tactical" in nature and that courts should not require proof of such a tight nexus between advocacy and harm before permitting the legislative and executive branches to decide that there is an unacceptable threat to the well-being of society. See *Neutral Principles,* 47 Ind. L.J. at 33. In his testimony before this committee, however, Judge Bork indicated that, although *Brandenburg* requires a tighter nexus between advocacy and harm than he might urge as an origi-

nal theoretical matter, experience has shown him that our society has a remarkable degree of stability. Judge Bork stated:

> I think that what I thought was wrong with *Brandenburg* then was that it did not take sufficient account of the danger of not one speaker but many speakers passing the same message of violent overthrow or violence. No one speech of which could produce violence or violent overthrow, but taken together, might produce a very dangerous situation. I now think that this society is not susceptible to that, even in its worst days, and I also think that the first Amendment says will we take that chance.

And, as a practical matter, he has stated:

> I now accept, as a judge, the position that the law has reached [in *Brandenburg*], and I have no desire to overturn it. I have no desire to whittle it away.

On this point, Judge Bork was questioned about whether a 1985 speech that he gave at West Point did not suggest a recent and continuing practical uneasiness with *Brandenburg.* Judge Bork also discussed the first amendment and speech about violent overthrow in his June 10, 1987 radio interview. When asked to comment on the position he had taken in his 1971 article and in other writings prior to his appointment to the bench, Judge Bork carefully prefaced his response by stating "let me speak as I spoke back then rather than now because sometimes I have changed my mind, but I cannot take current positions." He then sought to dispel any impression that this statement might have left that he had in fact changed his mind. At the end of his remarks, Judge Bork again added a caveat, stating: "At least that was the position I took in the 1971 article." (Worldnet Interview at 27.) In the address referred to, however, Judge Bork merely made two points about *Brandenburg,* neither of which suggests a continuing skepticism about the operation of that case. First, he recounted a story from his days as Solicitor General suggesting that he had then preferred the formulation of the clear and present danger test used in Chief Justice Vinson's plurality opinion in *Dennis* v. *United States,* 341 U.S. 494 (1951), over the test adopted in *Brandenburg. The Constitution and the Armed Forces* at 9 (1985). Second, he stated that, as Solicitor General, he had argued that *Brandenburg* was an inappropriate test to apply *in a military context,* where discipline and morale are at a premium. *Id.* at 9–10. The oral argument that he was describing was in *Parker* v. *Levy,* 417 U.S. 433 (1974), and the Supreme Court accepted his position.

Finally, Judge Bork's testimony clarified a theoretical distinction between the kind of law violation discussed in his academic writings and the kind that is used to test the constitutionality of unconstitutional laws. Judge Bork, in testimony discussing advocacy of law violation, stated: "Now, I want to take out of this discussion the Martin Luther King kind of problem where often Dr. King was advocating violating a law to test its constitutionality—I have no problem with that. I am talking about the advocacy of law violation that is not aimed at framing a constitutional test." This testi-

mony essentially reiterated the following position that he had stated in an interview with a news magazine:

> There's a large difference between advocating that things be burned down or blown up and urging a sit-in demonstrations. First, the civil rights demonstrators of the 1950s and 1960s premised their advocacy on the theory that the laws against things like integrated lunch counters were unconstitutional. And second, in our system, often the only way to get a disagreement about constitutionality into courts is to break the law, get arrested and then have the matter adjudicated.

(U.S. News & World Report, Sept. 14, 1987, at 22.) Judge Bork thus plainly recognized that one cannot be punished for the violation of unconstitutional laws. Contrary to the assertion of one of the witnesses, this position does not go against his academic writings on the advocacy of lawlessness. Judge Bork recognizes that the Constitution, as interpreted by the Supreme Court, is the supreme law of the land and supervenes to contrary state and federal enactments. Thus, when a person disobeys an unconstitutional, and therefore invalid law, it cannot be law violation in the sense addressed by Professor Bork's theories.

During the hearings, some question was also raised about Judge Bork's view of *Hess* v. *Indiana*, 414 U.S. 105 (1973), which he had criticized alongside *Brandenburg* in 1979. See University of Michigan Speech at 21–22. *Hess* involved an application of the *Brandenburg* test to advocacy of law violation, but also contained an additional element—the speaker in *Hess* publicly shouted an obscenity. Judge Bork's testimony indicated that he had no objection to the application of the *Brandenburg* test to the facts in *Hess*, but, at the same time, he questioned whether the independent fact of public obscenity should have been protected in that case. In other words, Judge Bork's belief that the public use of obscenity might have independently justified the criminal action against Mr. Hess has nothing to do with the separate and distinct fact that Mr. Hess had also advocated law violation. Indeed, Judge Bork stated explicitly:

> I think there was a problem of obscenity in there and not just a problem of inciting to lawlessness. Now, if the gentleman had said what he said without the obscenities, that's right, *Brandenburg* covers it.

Moreover, while indicating he was "not wild about" *Hess* because of the obscenity element, *id.*, even with respect to that, Judge Bork indicated that he "would have to go back and look at [*Hess*]" before deciding whether he would or would not agree with the result.

SUMMARY

Judge Bork's testimony established that he has had an exemplary record on the first Amendment while on the bench. He also pointed out substantial areas of agreement between his earlier academic positions and prevailing first Amendment doctrine, and indicated that, to the extent there were differences, he accepted the Supreme Court's first Amendment jurisprudence as settled precedent.

SEPARATION OF POWERS

Judge Bork's testimony clearly established that, like Justice Brennan,[1] he views the separation of powers as a bulwark of our liberties. Accordingly, Judge Bork's approach to the separation of powers does not favor the executive, the legislative branch, or the judiciary; rather it seeks to discern the assigned role of each coordinate branch in our constitutional system. In deciding questions of standing to sue, for example Judge Bork, like Justice Powell,[2] believes that the limited Article III role of th Federal courts precludes the Federal judiciary from taking on a role that would involve it in abstract political disputes. On important questions regarding the constitutionality of the independent counsel, moreover, Judge Bork's record demonstrates that, while he believes that criminal prosecution may not be wholly insulated from the executive branch, he also accepts that some measures may be employed to shield a special prosecutor from political pressure. On the question of war powers, consistent with our constitutional scheme, Judge Bork's theory envisions congressional control over the major, strategic decisions of war and peace, but exclusive presidential authority on the tactical side of military operations.

Judge Bork has also taken several other positions clearly demonstrating that he has not pro-executive bias. He has taken an exceptionally narrow view of the doctrine of executive privilege, and believes that a deliberative process privilege inheres in each of the three branches. While he was Solicitor General, moreover, Judge Bork argued that a sitting Vice President could be indicted. Finally, the position that he took on the pocket veto while Solicitor General conclusively refutes any claim of pro-executive bias.

CONGRESSIONAL STANDING

Judge Bork's testimony concerning his views on "congressional standing"—views most fully expressed in his dissenting *Barnes* v. *Kline,* 759 F.2d 21 (D.C. Cir. 1985), vacated as moot, 107 S.Ct. 734 (1987)—confirms that his position is squarely based on the necessity of maintaining the constitutional limits on the role and powers of the Federal courts, and is in no way hostile to the constitutional powers of Congress. Indeed, Judge Bork's position is indistinguishable from the one adopted by then-Judge Scalia in *Moore* v. *House of Representatives,* 733 F.2d 946, 959 (D.C. Cir. 1984) (concurring opinion), cert. denied, 105 S.Ct. 779 (1985): "no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest." Justice Scalia was confirmed unanimously, and it was not suggested that his rejection of the theory of

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[1] *Northern Pipeline* v. *Marathon Pipe Line,* 458 U.S. 50, 57 (1983) (plurality opinion of Brennan, J.) ("To ensure against . . . tyranny, the Framers provided that the Federal Government would consist of three distinct branches, each to exercise one of the governmental powers the Framers recognized as inherently distinct."); *CFTC* v. *Schor,* 106 S. Ct. 3245, 3262 (1986) (Brennan, J., dissenting) ("In order to prevent . . . tyranny, the Framers devised a governmental structure composed of three distinct branches—'a vigorous legislative branch,' 'a separate and wholly independent executive branch,' and 'a judicial branch equally independent.' ").

[2] For example, in his majority opinion in *Warth* v. *Seldin,* 422 U.S. 490, 498 (1975), Justice Powell stated that the doctrine of standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society."

governmental standing (including congressional standing) should disqualify him as a nominee. There is no reason to apply a different standard to Judge Bork.

The reasoning that led Judge Bork in *Barnes* to the conclusion previously articulated by Judge Scalia is as follows: First, "the rationale which underlies congressional standing doctrine also demands that members of the executive and the judicial branches be granted standing to sue whenever their official powers are allegedly infringed by another branch or by others within the same Branch." *Barnes*, 759 F.2d at 53. If such suits—which were never even attempted prior to *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974)—were to become familiar and routine, the result would be "general, continual, and intrusive judicial superintendence of the other institutions in which the framers chose to place the business of governing." *Id.* at 61. After examining Supreme Court precedent and a wealth of historical evidence concerning the original understanding of the limited powers of the Federal courts under Art. III of the Constitution, Judge Bork concluded that the theory of governmental standing is inconsistent with binding Supreme Court precedent and with Article III itself. That is why, as a lower court judge, he urged his colleagues to "renounce outright the whole notion of congressional standing." *Id.* at 41.

Thus, Judge Bork was entirely accurate when he testified that he is "not hostile to Congressional standing any more than . . . to Presidential standing or judicial standing." To the contrary, Judge Bork's central concern is that the theory of governmental standing makes "the judiciary the umpire and central branch of deciding questions, on a daily basis, between the other branches and between units of the other branches and so forth." For that reason, Judge Bork testified, "[i]n the routine kind of case in which the President and the legislative branch get into a squabble over whether an appropriations bill is being properly carried out, I think there should not be congressional standing or Presidential standing or judicial standing in that kind of a case and what I am really trying to protect—this is an aspect of my general philosophy of judicial restraint—what I am really trying to protect is to prevent the courts from stepping into legislative business."

Far from being inimical to the interests of Congress, then, Judge Bork's position will clearly serve those interests in the long run. A few examples should suffice to illustrate the problems that the theory of governmental standing would create if it were to become settled law. The President could sue Congress any time it enacted a law that the President believed infringed on his constitutional powers. (Even in the highly unlikely event that the Speech or Debate Clause would bar such a suit, the President could refuse to abide by the law on the grounds that Congress or its Members could sue *him* if they truly believed the law to be constitutional.) Members of Congress could challenge the allocation of committee seats between the two parties, as was unsuccessfully attempted in *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983). Senators who believe that the filibuster is unconstitutional, or unconstitutional in a particular instance, could sue for a judicial answer to that question. If Congress were to enact the amendment to the Fair Housing Act currently being considered by this Committee, which

would give Administrative Law Judges the authority to adjudicate certain claims under the Act, a Federal district judge would have standing to challenge the legislation based on a claim that Article III judicial powers are being conferred on judges who lack the life tenure Article III requires.

Many more examples could be given, but the point was sufficiently made by Chief Justice John Marshall in a speech to Congress in 1820: "A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which has taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the law and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power . . . could exist no longer, and the other departments would be swallowed up the judiciary." 18 U.S. (5 Wheat.) Appendix at 3, 16. Suits in which standing is based on impairment of the respective governmental powers of the Branches or their officers bear little if any resemblance to "case[s] in law or equity," and to allow such suits would greatly expand the powers of the Federal judiciary, at the expense of the President, Congress, and the American people.

Judge Bork did acknowledge, however, that while he would "renounce [congressional standing] outright as far as the regular kind of case is concerned," there might be an "extreme case" in which "one might try to fashion a doctrine" that would allow standing on the part of Congress or its Houses to seek judicial resolution of a critical constitutional dispute with the President. As Judge Bork put it, "I have to admit that I do not know how that case would look to me if it comes and it is extreme enough." Thus, Judge Bork made plain that his general opposition to congressional standing might give way in the extreme case. He also acknowledged that if it could be established that "the horrible consequences that I imagined would flow from recognizing standing in these cases do not, in fact, flow, then a large part of my objection vanishes."

In order to put the issue of congressional standing in perspective, it is important to note several additional points. First, the Court of Appeals for the District of Columbia Circuit—the only court that has adopted the theory of congressional standing—has also fashioned a novel doctrine of "equitable" or "remedial" discretion that permits the court to refuse to decide the merits of the case even though the court finds that the congressional plaintiffs have standing. Indeed, the Court of Appeals has invoked this doctrine in many of the cases in which it has found congressional standing, and where this is done the result for the congressional plaintiffs is identical to the result of denying them standing. See, in addition to the *Vander Jagt* and *Moore* cases, *Crockett* v. *Reagan,* 720 F.2d 1355 (D.C. Cir. 1983), and *Riegle* v. *Federal Open Market Committee,* 656 F.2d. 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

Second, it should be remembered that other "justiciability" doctrines, such as ripeness and the political question doctrine, may bar many of the suits congressional plaintiffs would bring were their standing recognized. In *Goldwater* v. *Carter,* 444 U.S. 996 (1979), the Court of Appeals had ruled that members of Congress had standing

to sue the President over his unilateral termination of a treaty with Taiwan, and had ruled in favor of the President. 617 F.2d 697 (D.C. Cir. 1979) (en banc). The Supreme Court held that the suit should be dismissed without reaching the merits, but there was no majority view as to how this result should be reached. Four Justices voted to dismiss the case under the political question doctrine (which would mean that the case could never be heard no matter what injury a particular plaintiff might allege), and Justice Powell voted to dismiss the case on the grounds that it was not ripe for judicial review. (In addition, one Justice did not participate, two Justices would have postponed review of the justiciability issues for fuller argument and briefing, and one Justice reached the merits without discussing standing). This certainly indicates that suits in which it might seem tempting to allow congressional standing may nevertheless be barred by other Article III limitations.

Finally, it should be noted that in many instances a private plaintiff would have standing to sue to raise the identical constitutional questions congressional plaintiffs might seek to litigate. As Judge Bork wrote in *Barnes:* "Many of the constitutional issues that congressional or other governmental plaintiffs could be expected to litigate would in time come before the courts in suits brought by private plaintiffs who had suffered a direct and cognizable injury. That is entirely appropriate, and it belies the argument that this court's governmental standing doctrine is necessary to preserve our basic constitutional arrangments." 759 F.2d at 61.

In sum, Judge Bork's position on governmental and congressional standing is consistent with his philosophy of judicial restraint, and avoids a major expansion of judicial power for which there is no support in the Constitution or in Supreme Court precedent.

Independent Counsel

Some questions were posed regarding views that Judge Bork had expressed on the constitutionality of special prosecutors in testimony he offered in 1973 as Acting Attorney General. There was some suggestion that the views expressed in that 1973 testimony cast doubt on whether he would sustain the constitutionality of the current independence counsel scheme established by the Ethics in Government Act. The testimony that Acting Attorney General Bork gave in 1973 was on legislation that was never enacted, and, Judge Bork recalled that, unlike the Ethics in Government Act, the Watergate Special Prosecutor bills would have established prosecutors wholly outside the executive branch—that is, subject to appointment, control, and removal by the judiciary. He also recalled that in his 1973 testimony he had asserted that a special prosecutor, if not appointed by the President by and with the advice and consent of the Senate, could be protected against removal by statute. He also noted that his 1973 testimony had asserted that "Congress probably could protect a special prosecutor from discharge except for cause." *Id.*, see *Special Prosecutor and Watergate Grand Jury Legislation,* Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93rd Cong., 1st Sess. 260–61 (1973) ("House Hearings"). It should be noted that a standard of removal very similar to that approved in 1973 by

Acting Attorney General Bork is currently that principal focus of a Justice Department's court challenge to the constitutionality of the Ethics in Government Act.

It is also worth noting that, although Acting Attorney General Bork's testimony strongly criticized provisions placing the appointment of the Watergate Special Prosecutor in the judicial branch, his testimony does not categorically reject the possibility of judicial appointment of a Federal prosecutor. Indeed, when questioned about the longstanding practice of having courts appoint Federal prosecuting attorneys on an interim basis, Acting Attorney General Bork noted that he did not object to the constitutionality of that practice because the prosecutor "remains subject to the control and direction of the Department of Justice and also remains subject to Presidential removal." House Hearings at 259. Thus, it appears that Acting Attorney General Bork's objection to judicial appointment is more aptly described as an objection to judicial appointment, direction, and control over criminal prosecution. This suggest that he might not find objectionable a scheme like that established in the Ethics in Government Act, which provides for judicial appointment of an independent counsel, but leaves considerable measures of control in the executive branch.

Moreover, Judge Bork has sat on two cases involving the Ethics in Government Act. In both cases, the Department of Justice argued that, if the court construed the statute to permit judical control over certain prosecutorial decisions, the law would be unconstitutional. In *Nathan* v. *Smith*, 737 F.2d 1069 (1984), Judge Bork wrote a concurring opinion holding that the statute was constitutional because it left with the executive branch the important prosecutorial decisions at issue in the case. Similarly, in *Banzhaf* v. *Smith*, 737 F.2d 1167 (1984), Judge Bork joined a *per curiam* decision of the full D.C. Circuit court, which similarly construed the statute in a constitutional manner.

War Powers

Some members of the Committee expressed an interest in Judge Bork's views on the War Powers Act. He has actually said very little on the subject, but noted in the late 1970s that some aspects of the Act are "probably unconstitutional." In his testimony, Judge Bork stated that he believed that the consultation and notification provisions of the Resolution were probably constitutional. He also noted that he believed the Act contained a legislative veto, which, at the time of his earlier remark on the Resolution, he "thought was probably unconstitutional." As Judge Bork's testimony indicates, the Supreme Court concluded that legislative vetoes are unconstitutional in *INS* v. *Chadha*, 462 U.S. 917 (1983).

While he has never undertaken any detailed analysis of the various specific provisions of the War Powers Resolution, Judge Bork's general approach to evaluating that law would be directly traceable to his view that "[t]he Constitutional division of the war power between the President and the Congress creates a spectrum in which those decisions that approach the tactical and managerial are for the President, while the major questions of war and peace are, in the last analysis, confined to Congress." Bork, *Comments on*

Legality of U.S. Action in Cambodia, 65 Am. J. Int'l L. 79-81 (1971).

His prior expressions of views on this sharing of authority, in fact, seem to be a rather uncontroversial application of clear principles set forth in the Constitution. As a law professor in 1978, Judge Bork stated in testimony on a bill to regulate foreign intelligence activities that

> Congress clearly has the constitutional power to declare war or refuse to declare war. It also has the power to appropriate funds for armed conflict or refuse to do so. Congress has, in fact, the raw constitutional power to disband the Armed Forces altogether and leave the President as Commander in Chief in name only, without a single platoon to maneuver.

National Intelligence Reform and Reorganization Act, Hearings Before the Senate Select Subcommittee on Intelligence, 95th Cong., 2d Sess. 459 (1978) ("Senate Foreign Intelligence Hearings"). Professor Bork's Senate testimony on the National Intelligence Reorganization and Reform Act of 1978 suggested that highly "*detailed* control of" and "*extensive* restrictions on" the President's conduct of foreign intelligence activities might raise significant constitutional questions. Senate Foreign Intelligence Hearings at 457–58. Professor Bork also took pains to note, however, that carefully drawn reporting and oversight requirements were both desirable and constitutional. *Id.* at 463.

In his Senate testimony, as well as in testimony before the House on a related bill, Professor Bork also argued that a serious constitutional question might arise from the imposition of a warrant requirement on the President in his conduct of foreign relations activities. See Senate Foreign Intelligence hearings at 461–62; *Foreign Intelligence Surveillance Act*, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, 95th Cong., 2d Sess. 134–35 (1978). Professor Bork's position was supported by the opinions of at least two Federal appeals courts, see, *e.g.*, *United States* v. *Butenko*, 494 F.2d 593 (3rd Cir.), *cert. denied*, 419 U.S. 881 (1974); *United States* v. *Clay*, 430 F.2d 165 (5th Cir. 1970). Moreover, every President, beginning with Franklin D. Roosevelt, had claimed the authority to conduct foreign intelligence activities without a court order. In his testimony before this Committee, Judge Bork recounted the positions he had taken on this matter, and noted that the position he had taken on warrantless foreign intelligence surveillance was a description of "the way the law stood at the time I was saying that." Professor Bork's views on this matter were also consistent with Justice Powell's opinion for the Court in *United States* v. *United States District Court*, 407 U.S. 297 (1973). Although that case held that warrants were required in the context of domestic intelligence gathering, Justice Powell's opinion expressly reserved the question of foreign activities. *Id.* at 308.

By contrast, drawing on examples of operational decisions from World War II, Professor Bork expressed doubt as to whether Congress could "have ordered the Doolittle raid on Tokyo, directed that France be invaded from the south rather than through Normandy,

or directed the airborne troops at Bastogne to surrender during the Battle of the Bulge." Senate Foreign Intelligence Hearings, 1978, at 460.

Judge Bork reiterated his understanding of this basic dichotomy during his testimony before this Committee. Judge Bork gave the following concrete example of his expansive view of congressional powers in the sphere of war and peace: "As far as Vietnam is concerned, Congress could have cut off the funds and ended that war, whenever. That would have been entirely constitutional." He reiterated that "if Congress had told [the President] to surrender the airborne troops at Bastogne, I think that is a decision for the President, not for the Congress. That is a tactical decision, and he is Commander-in-Chief." He also stated that "there is a vast spectrum between the ultimate strategic questions of war or peace and tactical decisions in the field, and it may be that *some constructions* of the War Powers Act might get Congress into clearly tactical decisions, but I am not sure about that. I have not looked at that for a long time." (Emphasis added.) Others have had considerably stronger things to say about the War Powers Resolution. For example, during the debates, Senator Sam Ervin stated: "The bill is not only unconstitutional, but is also impractical of operation. In short, it is an absurdity." See Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16 Wm. & Mary L. Rev. 823, 842 (1975). Judge Bork asserted, however, that, if the War Powers Resolution were to come before him, he "would construe the Act to save its constitutionality as a judge should." To the extent that, as a professor, Judge Bork had called the War Powers Resolution "unworkable," he noted in his testimony that "[t]hese are policy questions, and they are not for me [as a judge to decide]."

In sum, Judge Bork's philosophy of the allocation of war making powers is plainly neither pro-executive or pro-legislative; rather, it seeks to strike the balance found in the Constitution.

Executive Privilege

A question was raised about Judge Bork's view of executive privilege, as expressed in his dissenting opinion in *Wolfe* v. *Department of Health and Human Services,* 815 F.2d 1527 (1987), a Freedom of Information Act case involving the requested disclosure of documents tracing the status of proposed regulations in the decision-making process. The majority opinion ordered disclosure of the documents under the statute, and, in a short passage, dismissed the government's claim that a constitutional privilege shielded the deliberative documents from disclosure. Judge Bork's dissenting opinion argued that the Freedom of Information Act did not require disclosure, and would not therefore have decided the constitutional question. However, although he was reluctant to reach this "complex and important issue," he added a few words to address the way the majority "casually dispose[d] of the important issue." *Id.* at 1527. He stated that, in order to determine whether executive privilege was available, he would remand in the case to the district court to determine whether the communications at issue were in pursuance of the function of *directly* advising and assisting the

President. This is an exceedingly narrow view of executive that would exclude from protection the confidential deliberative processes of most of the executive branch. It is a view significantly less hospitable to the executive than that currently espoused by the Department of Justice. It is by no means a "pro-executive" view.

Judge Bork's dissent in *Wolfe* also articulated a broader theory of governmental immunity that would expansively protect from disclosure the internal deliberations of all three branches. He stated:

> Although the constitutional defense to . . . disclosure here asserted by the government is referred to as "executive privilege," nothing about the privilege is distinctly executive. Rather, the privilege is an attribute of the duties delegated to each of the branches by the Constitution. Neither Congress nor the courts, any more than the executive, could be constitutionally forced by a coordinate branch to reveal deliberations for which confidentiality is required.

815 F.2d at 1539. Thus, with respect to the privilege against disclosure of confidential deliberations, it is plain that Judge Bork's position is not pro-executive, but seeks to preserve the effective functioning of all branches of the government.

The Agnew Case

While he was Solicitor General, Judge Bork was asked by Attorney General Richardson to review Federal criminal proceedings being considered against incumbent Vice President Spiro T. Agnew. Solicitor General Bork concluded that the evidence warranted indictment of the Vice President and that, contrary to arguments advanced by Vice President Agnew's lawyer, a sitting Vice President could be indicted before being impeached by Congress. Attorney General Richardson and Solicitor General Bork went to the White House to persuade the White House staff to permit the Department of Justice to indict the Vice President. When they encountered resistence from the staff, they went to see the President and persuaded him that there was only one possible course of action. President Nixon agreed to let them indict Mr. Agnew.

Attorney General Richardson, in an unusual move, asked the Solicitor General to draft a pleading for the trial court. The brief filed argued that civil officers of the United States were not generally immune from prosecution, and that the Vice President was no exception. Within several days of its having been filed, the Vice President resigned from office and pleaded *nolo contendre* to the charges. In his testimony before this Committee, former Attorney General Richardson commented that he had "learned to have great respect for [Robert Bork] as a lawyer, especially when dealing with constitutional issues," during the time Attorney General Richardson was working "very closely" with Solicitor General Bork on "the issues presented by the Agnew case." Former Attorney General Richardson added that he regarded the *Agnew* case as a "substantially more difficult problem than anything [he] had had to deal with in Watergate." *Id.*

Pocket Veto

The fact that Judge Bork has no pro-executive bias is conclusively demonstrated by the role he played as Solicitor General in persuading the President not to use the pocket veto when Congress appoints an agent to receive messages during intrasession and intersession recesses and adjournments. Over the opposition of others in the Ford administration, who were urging an aggressive use of the pocket veto, which cannot be overridden by Congress, Solicitor General Bork used his institutional authority as the government's chief advocate in the Supreme Court to defeat a policy that he believed was an unconstitutional usurpation of Congress' power to override a presidential veto.

In *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974) for example, the United States Court of Appeals for the District of Columbia Circuit held that it was unconstitutional to use a pocket veto during a short intrasession recess when an agent of the originating House of Congress has been appointed to accept veto messages. Solicitor General Bork refused to seek *certiorari* to obtain review of this unfavorable ruling because he thought the appeals courts had correctly decided the case.

At the advice of others in the Justice Department and Office of Management and Budget, the Ford White House then resorted to a mixed form of veto during a longer recess than had been obtained in *Sampson*. This new form of veto was in substance a return veto—that is, the President returned the bill to the originating House with a message of disapproval—but, in the veto message, the White House claimed that it was preserving its claim to be able to use the pocket veto in those circumstances. This provoked a subsequent lawsuit. See *Kennedy* v. *Jones*, 412 F. Supp. 353 (D.D.C. 1976).

When the White House was attempting to determine how to handle the *Kennedy* v. *Jones* suit, Solicitor General Bork informed the Administration that he believed that it was unconstitutional to use the pocket veto accept at the final adjournment *sine die* of a Congress and that he would not argue any case in the Supreme Court defending the use of the pocket veto in other contexts; see also Memorandum to President Gerald R. Ford, from Attorney General Edward H. Levi, March 18, 1976 (Appendix A). The refusal of the Solicitor General to sign a brief or argue a case is a sign to the Supreme Court of his disagreement with the Administration's position and significantly harms the chances of success before the Supreme Court.

At the same time, Solicitor General Bork prepared for the Attorney General "a lengthly analysis of the constitutionality of the pocket veto and concluded *against the President*"; see also Memorandum to Attorney General Edward H. Levi, from Solicitor General Robert H. Bork, January 26, 1976 (Appendix B). Solicitor General Bork's analysis in this case was based on what he believed was the "original understanding" of the pocket veto clause. Attorney General Levi relied on this analysis in a memorandum to the President arguing for the abandonment of the pocket veto except at the end of a Congress, and he appended Solicitor General Bork's memorandum as the detailed legal basis for his conclusions; see also Memorandum to President Gerald Ford, from Attorney General

Edward H. Levi, Jan. 29, 1976 (Appendix C). Considerable infighting went on within the White House, but in the end the position of the Solicitor General and Attorney General prevailed, and a press release drafted by the Solicitor General's office was issued on April 13, 1976 indicating an abandonment of the challenged use of the pocket veto. The Washington Post wrote an editorial praising Solicitor General Bork and Attorney General Levi for the role that they played in getting the President to stop using the pocket veto. See *Vetoing the Pocket Veto,* Washington Post, Apr. 21, 1976, at A14.

Thus, *while he was a high official in the executive branch,* Robert H. Bork stood on principle and opposed the use of a presidential prerogative in circumstances that he believed were not intended by the Constitution. This clearly demonstrates that Judge Bork does not favor the executive, but is faithful to the meaning of the Constitution in the area of the separation of powers, as elsewhere.

PRECEDENT

Judge Bork's testimony, writings and speeches demonstrate a view of precedent that is in full accord with the dominant tradition in American jurisprudence. That tradition reflects a recognition that there will be occasions on which a reconsideration of precedent will be appropriate, but that respect for continuity and stability in the law require that overruling of prior decisions be done sparingly and cautiously.

Surveying the literature and the Supreme Court case law, one detects two distinct approaches to the role of precedent in constitutional cases. The first position is that precedent should be given no weight when the Supreme Court is convinced of prior error in interpreting the Constitution. The other, more conservative, position is that precedent must be given some, although not dispositive, effect in deciding whether to overrule a prior constitutional decision. Judge Bork has embraced the latter approach.

Justice William O. Douglas advocated a more liberal approach, arguing that stare decisis should be given virtually no weight in constitutional adjudication. Writing in 1949, Justice Douglas explained why:

> [The judge] remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.

(Douglas, *Stare Decisis,* 49 Colum. L. Rev. 735, 736 (1949).)

The Supreme Court articulated a similar view 5 years earlier in *Smith* v. *Allright,* 321 U.S. 649 (1944), an 8–1 decision overruling *Grovey* v. *Townsend,* 295 U.S. 45 (1935), a unanimous decision handed down only 9 years earlier. The issue in these cases was the constitutionality of the white primary. *Grovey* had rejected the challenge, reasoning that to deny a vote in a primary was a mere refusal of party membership with which the State need have no

concern. The dissent in *Allright* took pains to point out that "[n]ot a fact differentiates [the prior] case from this except the names of the parties." Nevertheless, the majority felt no obligation to abide by *Grovey,* looking instead to the constitutional provisions dealing with the right to vote. Convinced of its prior error, the Court overruled *Grovey,* commenting on the role of precedent as follows:

> In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day.

(321 U.S. at 665.)

Many judges and scholars, however, advocate a more cautious and restrained view, emphasizing the need for stability and continuity in the law. For example, while recognizing that "[a] reforming court must constantly overrule precedent," Professor Archibald Cox has attempted to formulate a greater role for precedent in constitutional adjudication:

> In my view a clear-cut line of precedents, not shown to be logically inconsistent with a wider body of constitutional decisions, should be given great weight in a later case. I cannot measure the weight, but it should be so great—I think—as to outweigh the arguments for change unless one is pretty clear that the change is impelled by one of the deeper lasting currents of human thought that give direction to the law.

Judge Bork has repeatedly indicated his adherence to this latter view. He has stated that a court must always be prepared to reconsider prior decisions, but that a presumption exists in favor of stare decisis.

Regarding the propriety of a court overruling precedent when necessary, Judge Bork testified before the Committee:

> Times come, of course, when even a venerable precendent can and should be overruled. The primary example of a proper overruling is *Brown* v. *Board of Education,* the case which outlawed racial segregation accomplished by government action. Brown overturned the rule of separate but equal laid down 58 years before in *Plessy* v. *Ferguson.* Yet Brown, delivered with the authority of a unanimous Court, was clearly correct and represents perhaps the greatest moral achievement of our constitutional law.

This is a position which Judge Bork has maintained throughout his career. For example, in a 1968 article in Fortune magazine, he wrote:

> The history of the Fourteenth Amendment, for example, does indicate a core value of racial equality that the Court

> should elaborate into a clear principle and enforce against hostile official action. Thus the decision in *Brown* v. *Board of Education,* voiding public-school segregation, was surely correct.

(Accord *Ollman* v. *Evans,* 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).)

Nevertheless, Judge Bork has repeatedly stated that the mere fact that a judge regards a prior decision as incorrect is insufficient, standing alone, to justify its being overruled. Testifying at these hearings, he stated that: "overruling should be done sparingly and cautiously. Respect for precedent is a part of the great tradition of our law. . . ." Similarly, at this confirmation hearings in 1982, when he was nominated to his present position on the United States Court of Appeals for the District of Columbia Circuit, Judge Bork engaged in the following colloquy with Senator Baucus:

> Senator BAUCUS. While you are here, though, and I have a chance to pick your brain a little, do you have any general guiding principles as to when a Supreme Court judge should adhere to the principle in looking at, revisiting Supreme Court issues?
>
> Mr. BORK. Well, yes. I think it is a parallel to what Thayer said about the function of a judge when he is reviewing a legislative act for constitutionality. He said he really ought to be absolutely clear that it is unconstitutional before he strikes down the legislative act, if not absolutely clear, awfully clear.
>
> I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious.
>
> Senator BAUCUS. I appreciate that, Mr. Bork.

Throughout his writings, Judge Bork has emphasized that constitutional precedents cannot be lightly overturned. Citing the courts' broad interpretation of the commerce power, Judge Bork states:

> There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not be overturned, even if thought to be wrong. The example I usually give, because I think it's noncontroversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations, and so forth have been built up around that broad interpretation of the commerce clause that it would be too late, even if a justice or judge became certain that broad interpretation is wrong as a matter of original intent, to tear it up and overturn it.

A Talk With Judge Robert H. Bork, District Lawyer 29, 32 (May/June 1985). Judge Bork reiterated his concern the same year:

> If the Justices have become convinced that a decision cannot be squared with the Constitution, they ought to

> consider overruling it. But the Court should be careful. If a particular decision has become the basis for a large array of social and economic institutions, overruling it could be disastrous.

(*Robert Bork on Judicial Restraint,* Manhattan Report 14, 15 (1985).)

In addition to the decisions broadening the scope of the commerce power, Judge Bork cites the *Legal Tender Cases* as an example of a decision that, even if thought to be wrong, should not be overruled. In 1869, the Supreme Court, by a vote of 5–2, held beyond Congress' enumerated powers an Act making bills emitted on the credit of the United States—i.e., paper money—legal tender for the payment of public and private debts. See 75 U.S. 603. In 1871, by a vote of 5–4, the Court overruled the prior decision and held the Act a valid exercise of Congress' constitutional powers. See 79 U.S. 457. Madison's notes of the Constitutional Convention demonstrate that the Constitution was not intended to confer upon Congress the power to issue paper money as legal tender. See Dam, *The Legal Tender Cases,* 1981 Sup. Ct. Rev. 367. Nevertheless, Judge Bork's position is that if a majority of the Supreme Court today became convinced that the decision upholding legal tender was wrongly decided, the Court should not attempt to overrule that decision, given the attendant chaos and disruption of settled expectations that would follow. At these hearings, Judge Bork indicated several other areas of law, including the 1st Amendment, equal protection, and the incorporation of the bill of rights to the states, which he regards as too settled to be subjected to reconsideration by the Court. He said: "These are things of not only long standing but all kinds of things have grown up around them. Any judge understands that you don't tear those things up." Indeed, Judge Bork explained that it was particularly important that a judge who interprets the Constitution by reference to original understanding, even more than other judges, have respect for precedent: ". . . otherwise, he would be constantly trying to rip up the nation and its laws, and you can't do that."

Judge Bork was asked at the hearings which specific factors he would weigh in deciding whether a prior decision ought to be overruled. He noted at the outset that more is required than that the prior opinion simply be judged wrongly decided:

> . . . a judge must have great respect for precedent. It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought.

In determining whether a prior decision ought to be overruled, Judge Bork stated how he would proceed:

> I think I would look and be absolutely sure that the prior decision was incorrectly decided. That is necessary. And if it is wrongly decided—and you have to give respect to your predecessors' judgment on these matters—the presumption against overruling remains, because it may be that there

> are private expectations built up on the basis of the prior decision. It may be that governmental and private institutions have grown up around that prior decision. There is a need for stability and continuity in the law. There is a need for predictability in legal doctrine. And it is important that the law not be considered as shifting every time the personnel of the Supreme Court changes.

Finally, Judge Bork made a distinction at the hearings between precedent in the area of constitutional law and precedent in the area of statutory law. As he noted in his taped remarks at Canisius College in 1985: ". . . if you construe a statute incorrectly, the Congress can pass a law and correct you. If you construe the Constitution incorrectly, Congress is helpless." A tape of these remarks was played at the hearings in an effort to challenge Judge Bork's statement of his views of precedent. During the question and answer session following this address, in making the distinction between precedent in constitutional law and precedent in statutory law, Judge Bork stated, as he has repeatedly, that a court must always be willing to reexamine prior precedent. He neglected to add, as he always had before, that many areas of law are too settled to be overturned. Much was made of this single omission—as if Judge Bork were, in one question-and-answer session, repudiating all his previous (and subsequent) comments about precedent—but, as Judge Bork stated:

> Before we get off that tape, Senator, I would like to say this: you have in your hands speech after speech and interview after interview where I have said some constitutional decisions are too embedded in the fabric of the nation to overturn.

This distinction echoes one made by Justice Brandeis more than 50 years ago. His is the leading statement of the rule, worthy of quotation in full:

> *Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command. "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405–08 (1932).

It is important to emphasize that Judge Bork as indicating only that precedent in constitutional law is less binding than precedent in statutory law. In his remarks before and during his appearance before the Committee, he repeatedly identified several areas of constitutional law which he believes cannot now be overruled, regardless of whether a judge would have adopted their reasoning as an initial matter.

In sum, Judge Bork's views on precedent reflect the mainstream tradition in our jurisprudence—a tradition which recognizes the necessity, from time to time, of overruling prior decisions but erects a strong presumption against doing so.

ANTITRUST

The hearings affirmed that Judge Bork's academic writings on antitrust law are not only well within, but, in fact, define, the mainstream. Judge Bork's antitrust philosophy, which is most fully articulated in his book, *The Antitrust Paradox* (1978), holds that the antitrust laws were intended to enhance the welfare of consumers by rationally applying the principles of economics to maximize the output and minimize the price of goods and services. The Supreme Court has relied greatly on this theory in a process of rethinking the antitrust laws that began roughly ten years ago. Indeed, soon after *The Antitrust Paradox* was published, the Court, in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979), cited it to support the holding that the purpose of antitrust is the promotion of consumer welfare. In all, Professor Bork's seminal work has been cited approvingly in no fewer than six majority opinions by such Justices as Brennan, (*Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 107 S. Ct. 484, 495 n.17 (1986).), Powell, (*Matsushita Elec. Indus.* v. *Zenith Radio, Co.*, 106 S. Ct. 1348 (1986).), Stevens, (*Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985); *N.C.A.A.* v. *Board of Regents*, 468 U.S. 85, 101 (1984).), and Chief Justice Burger, (*Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1978); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 442 (1978).), as well as in Justice O'Connor's influential concurring opinion in *Jefferson Parish Hospital District No. 2* v. *Hyde* 466 U.S. 2, (O'Connor, J., with whom Burger, C.J., Powell and Rehnquist, JJ., joined, concurring in the judgment), and Justice Blackmun's dissenting opinion in *National Society of Professional Engineers* v. *United States* (435 U.S. 679, 700 n* (Blackmun, J., with whom Rehnquist, J., joined, dissenting.) Every Justice currently sitting on the Supreme Court has joined at least one opinion citing with approval *The Antitrust Paradox*.

Commenting on his book at the hearings, Judge Bork said:

> My entire book, which was published in 1978, is premised on the questions of what best serves consumers, what best serves consumer welfare. I have not made a single argument in this book which is not based upon that.

Following Judge Bork's nomination to become an Associate Justice of the U.S. Supreme Court, moreover, 15 former chairmen of the antitrust section of the American Bar Association signed a letter asserting: "Fortunately, the mainstream view, which no one

has helped to promote more than Judge Bork, is that the proper antitrust policy is one that encourages strong private and government action to promote consumer welfare rather than unnecessary intervention to protect politically favored competitors." (U.S. News & World Report, Sept. 14, 1987, at 23). We have attached the full text of this letter as an appendix to this report (see appendix D).

During the hearings, several questions were posed as to whether Judge Bork's theory of antitrust did not in fact operate to the detriment of the average consumer, which presented a different approach from earlier criticisms that Judge Bork's theory of antitrust focused excessively on consumer welfare. The thrust of the criticism at the hearings was in relation to his theory that a manufacturer may in some instances enhance efficiency and thus consumer welfare by regulating the terms under which its distributors sell the manufacturers' product. Judge Bork argued that such limitations on the terms of resale, which are known as "vertical restraints," could in some cases enhance consumer welfare by inducing the sellers to provide certain services in connection with the sale of a manufacturer's products. Judge Bork's argument should assuage any concerns that his antitrust theories are anticonsumer, for, in *Continental T.V., Inc.* v. *GTE Sylvania,* 433 U.S. 36 (1977), the Supreme Court expressly recognized and relied upon the efficiency-producing potential of a vertical restraint in upholding the legality of one that was imposed by a wholesaler upon its retail outlets. In so doing, moreover, Justice Powell's majority opinion cited an article by Robert Bork. See Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part II,* 75 Yale L.J. 373 (1966).

A panel of renowned antitrust scholars and practitioners confirmed that Judge Bork's antitrust scholarship has been extremely well-respected, highly influential, and well within the mainstream. For example, Harvard Law Professor Philip Areeda, whose treatise on antitrust is regarded by many as one of the definitive works in the field, stated that Judge Bork "is committed to the mainstream antitrust values of protecting consumers." Donald Baker, a partner in a major law firm, a former professor of law, and former Assistant Attorney General for Antitrust, argued forcefully that "Judge Bork's elevation to the Supreme Court would promote the cause of effective antitrust law." Significantly, Mr. Baker commented: "Professor Bork has come down squarely on the side of 'competitive efficiency.' So has the modern Supreme Court." *Id.* at 294. James Halverson, a partner in a major law firm and a former Chairman of the ABA Antitrust Section, stated: "[I]t is difficult for me to comprehend how knowledgeable people could take issue with Judge Bork's significant contributions to the improvement of our understanding of how antitrust laws were originally intended to be enforced in the interest of enhancing consumer welfare. Judge Bork's writings within the antitrust area have been among the most influential and scholarly ever produced." *Id.* at 296–97. Professor Thomas Kauper of the University of Michigan Law School, a former Assistant Attorney General for Antitrust, similarly remarked:

> [T]he Supreme Court, in a series of decisions beginning in 1977, has apparently agreed with Judge Bork's . . . proposition [that the antitrust laws are intended to maximize consumer welfare]. So, too, the Court in the past decade has developed substantial antitrust doctrine in accord with an economic analysis that focussed on price and output effects, as Judge Bork's writings have urged. Unless the Supreme Court in the past decade has itself been outside the mainstream of antitrust thinking, Judge Bork is clearly within it.

His testimony persuasively, reinforces the conclusion of the letter signed by 15 past chairmen of the ABA Antitrust Section stating that Judge Bork's views are not only within the mainstream, but have greatly helped to define it.

Finally, since he has been on the bench, Judge Bork has heard only one major antitrust case, in which he held that a group of Allied Van Lines companies had too small a share of the interstate furniture moving market to harm competitors and that their efforts to produce effective coordination could be justified as increasing efficiency and helping consumers. The opinion was a scholarly synthesis of seemingly conficting lines of Supreme Court precedent, carefully tracing the history of antitrust law in the process. Judge Bork's opinion was joined in whole by Judge Ruth Bader Ginsburg and in large part by Judge Wald. The parties asked the Supreme Court to review the case, but *certiorari* was denied. (*Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. 1986), *cert. denied*, 107 S. Ct. 880 (1987).) [1]

In sum, Judge Bork's scholarly record in antitrust has largely come to define the mainstream in that area, and his judicial record in antitrust, although sparse, is nonetheless distinguished.

CRIMINAL LAW ISSUES

Nearly one-third of the Supreme Court's caseload involves criminal justice—the largest single category of cases heard by the Court. And criminal justice issues are of vital, immediate concern to all Americans, especially the poor, the aged, women, and minority groups. These Americans are disproportionately victimized by criminals, and they are the most directly affected by, and concerned with, fair and effective criminal justice. When our criminal justice system fails—when hardened criminals are set free to prey on the public again—it is these disadvantaged Americans who are the first to suffer. As was stated during the hearings:

> Judge Bork's firm approach to criminal law is a matter that should be of interest to the civil rights community, for crime preys more savagely on the poor of our major urban centers. Judges who show excessive concern for the rights of criminals, and not enough for the victims of crime, do a disservice to all Americans, but particularly to the urban

[1] Judge Bork's other antitrust cases, *FTC* v. *PPG Indus.*, 798 F.2d 1500 (D.C. Cir. 1986), and *Neumann* v. *Reinforced Earth Co.*, 786 F.2d 424 (D.C. Cir. 1986), involved more routine, procedural issues.

poor who bear the brunt of the enormous cost of rampant crime in our society.

It is therefore imperative that the Senate give the closest attention to a nominee's views of criminal justice. This is particularly true of this nomination, because retiring Justice Lewis Powell repeatedly provided the crucial fifth vote on such important criminal law issues as the constitutionality of the death penalty. In fact, Justice Powell's vote was decisive throughout the entire 15-year trend away from Warren Court activism and toward a balanced approach rooted in the text of the Constitution.

It is ironic that those who employ the so-called balance issue against Judge Bork have chosen not to discuss the narrow margins by which important criminal law issues have been decided in the Supreme Court. Last term, for example, the constitutionality of capital punishment for especially heinous murders was sustained by a single vote against a challenge brought by a number of the organizations now opposing Judge Bork's nomination. The decisive vote to sustain was that of retiring Justice Lewis Powell. It seems obvious that these organizations oppose Judge Bork's nomination because on this and many other criminal law issues they seek to reverse settled decisions of the Court and impose their own political agenda. They hope to prevent the confirmation of any judge who would continue Justice Powell's conservative criminal jurisprudence.

Judge Bork's record as a scholar, Solicitor General, and jurist shows that he would follow the conservative criminal jurisprudence of Justice Powell. As Solicitor General of the United States, Judge Bork argued the trilogy of cases which established that capital punishment was not per se unconstitutional—decisions authored and joined by Justice Powell. As a scholar, Judge Bork has forcefully argued that the repeated references to capital punishment in the text of the Constitution refute the claims made by leftist academics and activist judges that the death penalty is unconstitutional. And both as Judge and as Solicitor General, Judge Bork has shared Justice Powell's insistence on the truth-seeking function of criminal trials.

By the same token, Judge Bork has repeatedly shown that he shares Justice Powell's insistence on providing criminal defendants and suspects with the full protections of the Constitution. For example, in *United States* v. *Brown* Judge Bork voted to overturn the convictions of members of the "Black Hebrews" sect because the trial court, by dismissing a juror, had violated the defendants' right to a unanimous jury. Judge Bork's decision to void nearly 400 separate verdicts in what is believed to be the longest and most expensive trial ever held in a District Court here shows that he will scrupulously follow the mandate of the Constitution to protect defendants' rights.

At the hearings, Judge Bork enunicated a balanced approach:

> I think a judge has two responsibilities. One is to ensure that any accused gets a fair, completely fair trial, so that he is not projudiced in any way. But the other responsibility is not to elaborate legal doctrine so that the appeal be-

comes a game, and somebody gets off on a technicality, which has nothing to do with fairness.

This balanced and fairminded approach, rooted in the Constitution, explains why groups representing over 400,000 law enforcement professionals have endorsed Judge Bork's nomination, including the National Law Enforcement Council, the National District Attorneys' Association, the International Association of Chiefs of Police, the National Sheriffs' Association, the National Association of Police Organizations, the Major City Chiefs association, the National Troopers Coalition, the International Narcotics Enforcement Officers Association, and the Fraternal Order of Police. The F.O.P.'s resolution on the nomination sums it up: "It is in the best interests of the citizens of the United States and all law enforcement officers that Judge Bork be confirmed to the Supreme Court."

WATERGATE

The Committee also heard from Judge Bork and others concerning the events of October 20, 1973, and the period thereafter. Judge Bork's execution of President Nixon's directive to dismiss Watergate Special Prosecutor Archibald Cox and his efforts to ensure that the Watergate investigation continued without disruption, delay or interference had been the subject of extensive testimony before this Committee and Judiciary Committee of the House of Representatives in November 1973, as well as during this Committee's hearings in 1982 which preceded the unanimous confirmation of Judge Bork's appointment to the Court of Appeals. As with those previous examinations of Judge Bork's conduct in the so-called "Saturday Night Massacre" and its aftermath, the hearings confirmed the reasonableness of Judge Bork's actions throughout the episode and highlighted his important contributions to the continuation and ultimate success of the Watergate investigation.

Despite the depth in which the events of October 20, 1973, had been explored in the intervening 14 years, it was apparent from news reports before these hearings that certain of Judge Bork's opponents would attempt to draw the nominee's integrity into question through references to the "Saturday Night Massacre." Such an attempt was made during the American Bar Association's deliberations, with a notable lack of success, as reported to the Committee by Judge Harold Tyler. During these hearings, the dismissal of Archibald Cox was largely a non-issue, with only two members of the Committee—both avowed opponents of the nomination—evincing any inclination to rehash those events. Judge Bork's testimony was corroborated on all relevant points by former Attorney General Elliot Richardson, who was present when the decison was made to carry out the President's order on October 23, 1973, and by Philip A. Lacovara, Counsel to Special Prosecutor Archibald Cox, who submitted a detailed statement to the Committee concerning the events in the aftermath of the Cox dismissal (see appendix E).

As he has testfied previously, Judge Bork described for the Committee the circumstances which resulted in his decision to carry out the presidential order to discharge Cox as Special Prosecutor. It was clear to then-Attorney General Elliot Richardson, who met with the President at the White House, that Cox's dismissal was

inevitable. Neither Richardson nor Judge Bork doubted that the President could lawfully order the discharge of Cox, who was an employee of the executive branch. Richardson previously had received an opinion of counsel that the President had such legal authority. The issue, therefore, was not *whether* Cox would be fired, but merely *who* would carry out the order. Unlike Richardson, who was personally bound by a congressional pledge not to dismiss Cox except for extraordinary improprieties, and Deputy Attorney General William Ruckelshaus, who regarded himself as similarly bound, Judge Bork—then the Solicitor General and third and last in the Justice Department's line of succession—has no such personal obligation. He thus could carry out the President's order.

The decision by Judge Bork to execute the presidential directive to dismiss Cox was made with an understanding that additional resignations and upheaval likely would follow if he, too refused the President's order and resigned. Judge Bork testified:

> My first thought to do it was the fact that we were in enormous governmental crisis. I don't know if everybody remembers . . . the sense of panic and emotion and crisis that was in the air. It was clear . . . from my conversations with Mr. Richardson and Mr. Ruckelshaus that there was no doubt that Archibald Cox was going to be fired by the White House in one form or another. The only question as how much bloodshed there was in various institutions before that happened.

Judge Bork understood that his action would be enormously unpopular, but he regarded it as clearly necessary in order to alleviate a serius governmental crisis. Forced to make a decision quickly, he acted courageously and selflessly. Although he was inclined initially to leave the government after doing so, Judge Bork was urged not to resign by Richardson and Ruckelshaus, who regarded his remaining Acting Attorney General as crucial in order to provide leadership and continuity for the Justice Department during a critical time. Recognizing the importance of his position, Judge Bork was determined to provide the necessary leadership.

Judge Bork's decisions to remain Acting Attorney General, and execution of the Cox dismissal order, for the purpose of keeping the Watergate investigation on track was corroborated by then-Attorney General Elliot Richardson. As the senior Justice Department official most knowledgeable about the impact of these events on the Watergate probe, Richardson's concurrence in Judge Bork's course of action was highly significant. At the hearings, Richardson testified:

> I believed that the President would accomplish the firing in one way or another. I believed that he had the legal right to do so. I believed that Bork was not personally subject to the same commitments [I had made to Cox and the Senate Judiciary Committee], and was thus personally free to go forward with this action, and that his doing so, in the circumstances, was in the public interest.
>
> I was concerned that if he did not, as I said, a chain reaction would follow, meaning that if he resigned, the domi-

noes could fall indefinitely, far down the line, leaving the Department without a strong and adequately qualified leader.

That was a very practical concern. We had a situation in which not only Ruckelshaus and I, but all my top staff, were picking up and leaving.

The question really, as a practical matter was, how do you maintain the continuity and integrity of the investigation in these circumstances.

Richardson made it clear that on October 20, 1973, neither he nor Judge Bork regarded the order to dismiss Cox as part of an effort to cover up presidential wrongdoing. Having participated in the negotiations between Cox and the White House concerning the special prosecutor's demand for access to subpoenaed tapes of presidential conversations, Richardson believed on October 20, 1973, that the compromise proposal advanced by President Nixon had been offered in good faith and that the decision to dismiss Cox after his rejection of the proposal "could be accounted for without attributing bad faith to the President." Richardson testified that it was "not until many months later that [he] came to the conclusion that the President's order was part of an effort to derail the investigation."

When viewed with the advantage of hindsight and the knowledge of Nixon's culpability that came months later, the dismissal of Cox may be seen as part of a presidential effort to obstruct justice. Two former members of the Watergate Special Prosecution Force, Henry Ruth and George Frampton, so portrayed it in their testimony before the Committee. Significantly, however, Ruth reiterated during his testimony that Judge Bork "acted honorably" and with "good intention" in his conduct during the so-called "Saturday Night Massacre." Philip Lacovara, Archibald Cox's Counsel on the Watergate Special Prosecution Force, submitted a statement to the Committee in which he noted his personal disagreement with the decision to dismiss Cox but stated that he is "satisfied that [Judge Bork] acted for what were reasoned and reasonable motives and that his conduct was in all respect honorable." The only witness actually involved in the decision to dismiss Cox and the events leading up to that dismissal, former Attorney General Richardson, testified that Judge Bork's actions were in the best interest of the Nation.

During the course of the hearings there were those who referred to the vacated District Court opinion in the *Nader* v. *Bork* case 366 F. Supp. 104 (D.D.C. 1973), as support for the allegation that Judge Bork acted "illegally" in dismissing Archibald Cox pursuant to the President's order. The opinion of Judge Gerhard Gesell in that case was never subject to appellate review because the plaintiffs chose to seek dismissal of the case rather than attempt to sustain Judge Gesell's strained decision in the Cout of Appeals. The Court of Appeals accordingly ordered Judge Gesell to vacate his ruling, and he did so, thereby rendering it of no legal consequence whatsoever.

Although the absence of valid legal authority to support the assertion did not deter some from continuing to characterize the Cox dismissal as "illegal", the hearings confirmed that the President

had the lawful authority to dismiss Cox, that his directive to that effect was carried out with an honest and reasonable belief in the legality of the action, and that any defect in the validity of the discharge on October 20, 1973, was remedied on the first business day thereafter when the regulations governing the Special Prosecutor were explicitly and formally revoked. No witness challenged any of these facts during the hearings.

Archibald Cox testified before Congress in November 1973, regarding the President's authority under the law to order his discharge:

> I think the President had the power to instruct the Attorney General to dismiss me, and that the suggestion made yesterday that he did was correct, and I don't question that. (Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 51 (1973) ("1973 Hearings").

The timing of the explicit rescission of the Special Prosecutor regulations was, in Cox's view, at most a "technical defect". He did not participate in the *Nader* v. *Bork* case and stated during his congressional testimony that he "wish[ed] the suit hadn't been filed. Mr. Cox's own opinion of the lawfulness of his discharge was simply ignored by those who attempted to make an issue of the Cox dismissal and label it as an "illegal" act.

Judge Bork and former Attorney General Richardson explained during their testimony that neither had any doubt on October 20, 1973, that the President could lawfully direct the dismissal of Special Prosecutor Cox. As Judge Bork stated at his hearing:

> The fact is none of us thought that that regulation was a bar to a presidential order . . . We assumed the President could do this over an Attorney General's regulation. That is what we thought at the time. (Transcript, September 16, 1987 at 32).

The explicit presidential directive to the Acting Attorney General effectively rescinded the Justice Department regulations appointing Cox, in Judge Bork's view, and no existing court decision holds to the contrary. The Supreme Court's ruling in *United States* v. *Nixon,* issued 9 months after the Cox discharge, held that jurisdiction of the Special Prosecutor could be premised upon extant Department regulations but did not address the impact of a written presidential directive upon the validity of those regulations.

Even if the presidential directive did not, as Judge Bork reasonably believed, effectively rescind the Special Prosecutor's charter, the defect was completely cured some 60 hours later when, on the first business day after the President's order, he explicitly and formally revoked the regulations. At most, then, the issue is one of the technical validity of the discharge during the 60-hour period. Given the criticalness of the situation that existed on October 20, 1973, and the unanimous view at the time that the President's order was a lawful one, it is apparent that Judge Bork committed no "Illegal" act and that the timing of formal revocation of the regulations, as Archibald Cox stated, was a "technical defect." Richardson testified, "very inconsequential in light of the circumstances

as a whole." The frequent reference during these hearings to the "illegality" of the Cox dismissal, therefore, were unwarranted and grossly misleading.

The actions of Judge Bork in the wake of the Cox dismissal also were discussed during the hearings, and it again was shown that his leadership was indispensable in holding the Special Prosecution Force together and ensuring that the Watergate investigations continued without interruption. The testimony confirmed the accuracy of the Report of the Watergate Special Prosecution Force, which in relevant part stated:

> The "Saturday Night Massacre" did not halt the work of WSPF, and the prosecutors resumed their grand jury sessions as scheduled the following Tuesday. Bork placed Assistant Attorney General Henry Petersen, head of the Criminal Division, in charge of the investigations WSPF had been conducting. Both men assured the staff that its work would continue with the cooperation of the Justice Department and without interference from the White House.

In his statement submitted for the record, Mr. Lacovara recounted that Judge Bork had assured him on the evening of Saturday, October 20, that he wanted the staff assembled by Archibald Cox to remain intact and to continue their investigations as Justice Department employees. The same message was conveyed by Judge Bork and Henry Petersen, Assistant Attorney General for the Department's Criminal Division, at a meeting with Lacovara and Deputy Special Prosecutor Henry Ruth on Monday, October 22, and at a meeting with other members of the Watergate Special Prosecution Force on Tuesday, October 23. Although Judge Bork was obliged by an order of the President to "take all steps necessary to return to the Department of Justice the functions now being performed by the Watergate Special Prosecution Force," Bork was so directed in President Nixon's letter to him dated October 20, 1973 (see appendix F). On October 23, 1973, the first business day after issuance of the presidential directive, the Acting Attorney General issued an order formally abolishing the Office of Watergate Special Prosecution Force. The Office was formally reinstated upon the appointment of Leon Jaworski as special prosecutor. He construed that order narrowly so as to require abolition of the Office of Watergate Special Prosecutor only in a formal sense while permitting him to retain the members of the Special Prosecution Force as an effectively independent unit functioning as before under the leadership of Mr. Ruth and Mr. Lacovara.

Although some of Judge Bork's opponents have suggested that his actions to preserve the integrity and independence of the Watergate investigation were merely a reaction of the "firestorm" of public protest that built after the Cox dismissal, such allegations are belied completely by Judge Bork's prompt and vigorous efforts to convince the Special Prosecution Force members to stay on and continue their investigations with his support. Indeed, Mr. Lacovara's statement to the Committee expressly rejected as "unfair and inaccurate" the suggestion that Judge Bork "was only willing to cooperate with the Watergate investigations after he detected

the so-called 'fire storm' . . ." Judge Bork testified that he "understood from the beginning that [his] moral and professional life were on the line if something happened to those investigations and prosecutions, and that is why [he] was adamant" that the Special Prosecution Force lawyers should continue their work.

Mr. Lacovara also made clear the significant consequences that flowed from Judge Bork's efforts to keep the Special Prosecution Force intact and functioning after Cox's dismissal. Had Judge Bork not done so, according to Mr. Lacovara, "there would have been substantial and perhaps irreparable obstruction of the ongoing criminal investigations." Mr. Lacovara's statement refuted the suggestion that Judge Bork's actions in this regard were inconsequential because "there [were] plenty of lawyers around" who could have taken over the investigation. This suggestion illustrates the tendency of Judge Bork's critics to discount or disregard altogether his important efforts to preserve the integrity of the Watergate probe.

Two former members of the Watergte Speciate Prosecution Force, Henry Ruth and George Frampton, confirmed the importance of Cox's staff in continuing the Watergate investigation after Cox's discharge but dismissed Judge Bork's role in the staff's decision to stay as "irrelevant." Although each sought repeatedly during his testimony to belittle the significance of the steps taken by Judge Bork to see that the team assembled by Cox remained intact, neither Mr. Ruth nor Mr. Frampton challenged the factual account of those steps as outlined in detail in Mr. Lacovara's statement to the Committee, nor did either suggest any additional steps that should have been taken by Judge Bork. Mr. Ruth's testimony was noteworthy for its sharp divergence in tone, if not substance, from his earlier statement, quoted in the *Los Angeles Times* (July 2, 1987), that "[Bork] clearly . . . did not march in lockstep with the White House concept to abolish us and make our lawyers part of the Justice Department." The suggestion by Mr. Ruth that Judge Bork had attempted to "rewrite history" by recalling his efforts to keep the Special Prosecution Force intact thus was not only unsupported in the record but was rebutted completely by Mr. Lacovara's detailed statement to the Committee and by Mr. Ruth's own previously published remark, which he acknowledged as accurate during his testimony.

Judge Bork's significant role in the appointment of a second special prosecutor also was discussed during the hearings. As he stated during his testimony before Congress in late 1973, Judge Bork testified that his initial belief that the Watergate investigation could proceed independently under the leadership of Ruth and Lacovara with Assistant Attorney General Petersen's general supervision changed as it became clear that public confidence in the integrity of the investigation would not be restored without appointment of a new special prosecutor.

The hearings established that Judge Bork undertook to identify an appropriate person for the special prosecutor post early during the week following the Cox discharge, and that he recommended appointment of a new special prosecutor to the President well before the decision to do so was made at the White House. Two witnesses, Professors Dallin Oaks and Thomas Kauper, gave unrebut-

ted testimony based on discussions each had with Judge Bork, probably on Monday, October 22, but certainly not later than Tuesday, October 23, that he was then searching for a qualified and respected person to replace Cox as special prosecutor. (Telegram from Thomas Kauper to Senator Biden) (see appendix G). A memorandum produce from the Nixon White House files confirmed that Judge Bork was privately urging the President to announce appointment of a new special prosecutor at least by Wednesday, October 24. (Memorandum from Leonard Garment to Alexander Haig dated October 24, 1973, with attached draft of presidential statement) (see appendix H).

Notwithstanding the uncontradicted testimonial and documentary evidence that Judge Bork undertook at an early stage to ensure appointment of a capable new special prosecutor, Mr. Ruth and Mr. Frampton made speculative and conclusory assertions to the contrary in their appearance before the Committee. Both men rested their conjecture upon the fact that Judge Bork did not disclose to them his efforts regarding a new special prosecutor, an action that hardly is surprising since Judge Bork could not have known whether those efforts would succeed until the President's assent finally was obtained.

As the testimony of Professor Oaks confirmed, Judge Bork focused early on Leon Jaworski as the primary choice to be the new special prosecutor. The former American Bar Association president enjoyed a widespread reputation for unimpeachable integrity, exceptional ability, and professional qualities deemed essential in order to inspire public confidence and ensure the success of the Watergate prosecutions. His appointment was announced by Judge Bork on November 1, 1973. Significantly, published accounts[1] several days earlier had described an apparent disagreement between the White House an the Acting Attorney General over the scope of the new special prosecutor's charter (see appendix I). Although President Nixon indicated at an October 26 press conference that the new prosecutor would not have access to presidential tapes and documents, Judge Bork insisted that the new special prosecutor's charter must be as broad as Cox' had been, including explicit assurances of the right to seek White House tapes and documents in court. Jaworski would not accept the position without such assurances, and the White House acceded prior to the November 1 announcement of his appointment.

The hearings left no doubt that, that by keeping the Special Prosecution Force intact in the wake of Cox' dismissal and by ensuring the appointment of a capable new special prosecutor with full guarantees of independence, Judge Bork made a highly significant contribution to the ultimate success of the Watergate investigations and prosecutions. In Mr. Lacovara's detailed statement to the Committee, he described a series of actions by Judge Bork that were supportive of the Special Prosecution Force's efforts to protect and advance the investigation in the aftermath of Cox's discharge, including his concurrence in placing the investigative files under court protection. The divergence between Mr. Lacovara's recollec-

[1] *New York Times*, October 29, 1973 (entitled "Nixon and Bork Split on Prosecutors' Role"); *New York Times*, October 28, 1973; *Washington Post*, October 31, 1973.

tion of events and the characterization given the same events by Mr. Ruth was striking. For example, Mr. Ruth cited the absence of Bork's name on the motion for a protective order as an indication of "how we felt about Mr. Bork at the time." In contrast, Mr. Lacovora cited Judge Bork's support for the protective order as evidence of the reliability of his pledge that the investigation would go forward without interference. Additionally, Judge Bork's reliance upon Special Prosecution Force attorneys to represent the Government at the critical October 23 hearing before Judge John Sirica concerning the subpoenaed White House tapes. Thereafter, Judge Bork approved a Special Prosecution Force request that a renewed demand for relevant presidential documents be communicated to the White House. The testimony at the hearings established that at no time was any request made by the Watergate Special Prosecution Force ever denied by Judge Bork or Mr. Petersen while they had responsibility for the Watergate investigations (see appendix J).

Finally, it should be noted that the efforts of Judge Bork's opponents to raise a credibility issue from insignificant differences in recollections of events after the Cox dismissal proved completely unavailing. Judge Bork testified that he assured Ruth and Lacovara on Monday, October 22, that he wanted the Watergate investigations to proceed as they had before Cox' dismissal and that he would tolerate no interference with the investigations so long as he remained Acting Attorney General. Both Mr. Lacovara and Henry Petersen, who was also present at the Oct. 22, meeting, submitted written statements to the Committee confirming that such was indeed the message conveyed by Judge Bork. While Judge Bork's recollection is that he mentioned his support for pursuit of the White House tapes at this meeting, the explicitness of the reference is unimportant. Mr. Lacovara stated that he "specifically recall[ed] the assurances that [Judge Bork] and Assistant Attorney General Petersen gave that the investigations would proceed on an objective, throrough and professional basis and would seek whatever evidence was relevant in determining guilt or innocence of the persons under investigation." Mr. Lacovara concluded that "the substance of Judge Bork's testimony . . . accurately reflects the tone and direction of his statements to the senior staff of the Watergate Special Prosecution Force in the hours and days after his dismissal of Special Prosecutor Archibald Cox."

Further confirmation of Judge Bork's consistent determination to support the Watergate Special Prosecution Force's efforts to obtain relevant presidential tapes and documents was provided by Henry Petersen and Judge Ralph Winter, who submitted statements to the Committee in which each recounted conversations he had with Judge Bork on Sunday, October 21. The statement submitted by Judge Ralph K. Winter was especially noteworthy as the discussion recountd by him included an explicit expression by Judge Bork that he necessarily would support efforts to obtain presidential tapes for evidentiary use if those carrying out the investigation regarded them as relevant (see appendix k). This expression came well before the so-called "firestorm" of public reaction to which some of Judge Bork's detractors have attributed his willingness to cooperate with the Watergate investigation.

The testimony of Messrs. Ruth and Frampton regarding Judge Bork's position on access to relevant White House tapes and documents seemed peculiar. After Mr. Ruth stressed the importance of the tape-recorded presidential conversations to the Watergate investigation, he was asked whether he agreed or disagreed with Mr. Lacovara's specific recollection that Judge Bork had assured the two of them on Monday, October 22, that the investigation should continue and "seek whatever evidence was relevant in determining guilt or innocence of the person under investigation." In response, Mr. Ruth did not challenge that such an assurance was given but contended that any assurance by Judge Bork was "irrelevant." At another point in his testimony, Mr. Ruth stated:

> We were told by Mr. Bork and Mr. Petersen we could ask for tapes and indeed we renewed old requests that had been pending when [Archibald Cox] was fired, but we did not know when it came time to go to court what the Justice Department believed, i.e., Acting Attorney General Bork, about executive privilege and about whether the court shuld order the production of the tapes.

Mr. Ruth did not explain why, after Acting Attorney General Bork had authorized the Special Prosecution Force to seek a court order compelling the President to turn over tapes, it was pertinent what Bork's personal view was "about whether the court should order production of the tapes." The matter was for the courts to determine. It is doubtful that Special Prosecutor Cox ever knew Attorney General Richardson's personal view of the merits of the executive privilege dispute ultimately decided by the Supreme Court in *United States* v. *Nixon,* or that Special Prosecutor Jaworski knew Attorney General William Saxbe's opinion, but both were, like Bork's view, wholly irrelevant. In his testimony, Judge Bork stated:

> I never took the position that the President had to hand over the evidence if he thought he had a legal right not to. I took the position that the Special Prosecution Force had a right to go to court to compel him to hand over the evidence, and, indeed, they did.

No one heretofore has suggested that Judge Bork could have, or should have, done more.

Throughout his testimony, Mr. Frampton asserted as fact matters that were neither within his actual knowledge nor supported in the record. For example, although he was not present at the Monday, October 22 meeting of Messrs. Bork, Petersen, Ruth and Lacovara, Mr. Frampton had no difficulty accusing Judge Bork of a "substantial reworking of the facts" in his description of that meeting and the assurances given there. Mr. Frampton was seemingly undaunted by the fact that a more senior member of the Special Prosecution Force, Mr. Lacovara—who, unlike Mr. Frampton, was present at this meeting—informed the Committee the substantive accuracy of Judge Bork's testimony. Mr. Frampton's willingness to impugn Judge Bork's integrity without factual support was evident in his description of the selection of Leon Jaworksi as special prosecutor and his assertions concerning the nature of Attorney Gener-

al Richardson's commitments to this Committee regarding Special Prosecutor Cox.

The actions of Judge Bork during the critical events of October 1973 have withstood the most exacting kind of scrutiny over a 14-year period. The renewed inquiry into those actions by some during the recent hearings disclosed nothing that would impugn in any way Judge Bork's integrity, judgment or commitment to the rule of law. To the contrary, what emerged from this most recent examination of Judge Bork's role in the so-called "Saturday Night Massacre" is an even clearer picture of a courageous and principled man. He was forced suddenly into a crisis not of his making, and sought to serve the national interest. He succeeded in doing so in a way that has had a lasting and beneficial impact on this country. His exemplary performance during that controversy strengthens the case for his confirmation to the Nation's highest court.

JUDGE GORDON'S AUGUST 24 LETTER CONCERNING VENDER JAGT V. O'NEILL

The only allegation made throughout these lengthy hearings concerning Judge Bork's integrity was made by Senior District Judge James F. Gordon of the Western District of Kentucky. Judge Gordon wrote the Committee on August 24 (see appendix L), accusing Judge Bork of attempting surreptitiously to make the law of the case and of the circuit his own minority view in the case of *Vander Jagt* v. *O'Neill,* 699 F.2d 1166 (D.C. Cir. 1983), without the assent or knowledge of the other two judges on the panel, Judge Gordon and Judge Roger Robb, now deceased. We regard Judge Gordon's allegations as patently misinformed and irrelevant to Judge Bork's qualifications, and we address it only because it was made by a Federal judge, and because it was raised several times during the hearings by members of the Committee.

In *Vander Jagt,* several Republican Members of the House of Representatives filed suit alleging that House committee assignments by the Democratic majority unlawfully diluted the political influence of the Republican Members and their constituents by assigning fewer seats on committees than their numbers would entitle them to proportionately. The district court dismissed the suit on the grounds that the challenge was precluded by the Speech or Debate Clause and the political question doctrine.

In his August 24 letter, Judge Gordon alleges, in essence, that after the three-judge panel had agreed, following argument, to dispose of the *Vander Jagt* appeal on one ground, Judge Bork, who had been assigned to write the opinion, decided unilaterally to change the rationale for the decision. Judge Bork allegedly attempted to do this, Judge Gordon suggests, by taking advantage of Judge Gordon's absence from Washington, DC, and Judge Robb's serious illness. Ultimately, Judge Gordon wrote the majority opinion of the court, in which Judge Robb joined, and Judge Bork wrote a concurring opinion.

Judge Bork explained his participation in that case during his testimony to our complete satisfaction. The Committee did provide the ABA with the letter, and asked the ABA to look into it. The ABA, according to the testimony of Judge Tyler, accepted Judge

Gordon's recollection of the events, and, without even getting Judge Bork's side of the story, determined that the matter was not serious enough to warrant further examination. Judge Tyler said that "we did not think that on balance this was serious, particularly since it happens once in a while in any event with the best of circumstances."

In order to respond more extensively to the Committee's questions, and undoubtedly in order to respond to the specific allegations made in Judge Gordon's letter, Judge Bork promised the Committee that he would submit a supplemental memorandum on this matter. Judge Bork submitted a detailed letter to the Committee on October 1, accompanied by affidavits of his two law clerks and Judge Robb's secretary, and contemporaneous correspondence between Judge Bork and Judges Gordon and Robb (See Appendix M). We believe that Judge Bork has demonstrated that there is absolutely nothing in his action in the *Vander Jagt* case that reflects adversely on his integrity.

We have also considered Judge Gordon's October 2 affidavit submitted in response to Judge Bork's testimony, and the affidavits of the law clerks to Judge Robb and Judge Gordon who handled the *Vander Jagt* case in the fall of 1982. We do not believe that there is anything in these affidavits that has not already been addressed and answered by Judge Bork in his testimony or in his October 1 letter to the Committee.

What Judge Tyler said "happens once in a while in any event with the best of circumstances" is that often a judge assigned to write an opinion for the court determines that the decision ought to be based on an additional or different rationale; sometimes the judge believes even the result should be different. This is a natural part of the judicial deliberative process, and this is what occurred in *Vander Jagt:* Judge Bork determined that a recent Supreme Court decision ought to be based on an additional or different rational; sometimes the judge believes even the result should be different. This is a natural part of the judicial deliberative process, and this is what occurred in *Vander Jagt:* Judge Bork determined that a recent Supreme Court decision dictated that the *Vander Jagt* appeal be decided for the reason that the plaintiffs lacked standing to sue. (After argument, the three judges had agreed that they would assume plaintiffs had standing, but that they were not entitled to judicial relief on other grounds.) Judge Bork visited presiding Judge Robb, they discussed Judge Bork's proposed change of rationale, and Judge Robb agreed to this change. This meeting is confirmed by Judge Bork's law clerk at the time of the meeting and by Judge Robb's personal secretary. (The October 2 affidavit of Judge Robb's law clerk states that the likelihood this law clerk did not begin his clerkship until after this meeting took place.) Judge Bork did not inform Judge Gordon of this change in rationale at the time, however, until after he sent Judge Gordon his proposed opinion in *Vander Jagt.*

This whole controversy erupted because, Judge Robb later did not recall this discussion with Judge Bork, and because Judge Gordon believes that Judge Bork never obtained Judge Robb's agreement to base the *Vander Jagt* decsion on standing grounds. Judge Robb's law clerk's statement that it is "very unlikely" that

Judge Robb would have forgotten the substance of a converstation with Judge Bork concerning a change in the rationale in this case is contradicted by the recollection of Judge Robb's personal secretary of fourteen years. And Judge Bork's account of his meeting with Judge Robb in a memorandum to Judges Robb and Gordon dated October 8, 1982, states, "Judge Robb does not remember my conversation with him, *does not doubt it took place,* but is sure he must have misunderstood what I proposed." (Emphasis added.)

In his letter, Judge Gordon recalls that he was upset because Judge Bork failed separately to highlight his change of rationale, and because the standing rationale was contrary to what the panel had agreed at conference. Judge Gordon recalls that he called Judge Robb's chambers to find out if Judge Robb agreed with Judge Bork's view of the case, only to find Judge Robb in the hospital. Judge Gordon recalls that he was told by another judge that Judge Robb was upset by the turn of events and that Judge Robb wanted Judge Gordon to prepared a majority opinion in *Vander Jagt* relying on the *Riegle* case.

Judge Bork points out in his letter to the Committee, and in a contemporaneous memo to the other judges, that the equitable or remedial discretion rationale from *Riegle* was not discussed by the panel at conference. Although Judge Gordon and Judge Robb's law clerk recall otherwise, we believe that Judge Bork's recollection is supported by the record. Judge Robb's law clerk remembers that the *Vander Jagt* file he reviewed at the time indicated that the panel had agreed at conference that *Riegle* would be the basis for decision, but there is no documentary support for that statement; indeed, what documents we have reviewed back up Judge Bork's recollection. Moreover, Judge Gordon's clerk does not indicate in his affidavit that the *Riegle* equitable discretion rationale was brought up before Judge Robb was apprised of Judge Bork's draft opinion some months after the argument. Finally, Judge Gordon's recollection is not based on any contemporaneous documents; he admits that he has not reviewed any of his files on the *Vander Jagt* case.

Judge Gordon's August 24 letter implied that Judge Bork never obtained the concurrence of Judge Robb. Hence, the allegation that Judge Bork tried to pull a fast one; to sneak one by the other judges on the panel.

Judge Bork stated in his testimony and his letter that "it is simply preposterous to suggest that I could or would have attempted any such thing," and indeed it is. We have examined Judge Bork's letter, and the documents and affidavits he and others have furnished to the Committee. Judge Gordon's recollection of the events in his August 24 letter, which was accepted by the ABA, is faulty in several respects, a fact he now concedes. In sum, Judge Gordon's allegation of misconduct simply does not hold up: Judge Bork obtained the concurrence of Judge Robb, or reasonably believed that he had done so; explained to Judge Gordon the basis for a change in rationale, only a few days after he sent Judge Gordon his draft opinion; apologized several times for failing immediately to apprise Judge Gordon of his visit with Judge Robb and of the change in rationale; and was completely forthright with both judges concerning his views of the case. We agree with Judge Bo

that had Judge Gordon consulted the several memos Judge Bork wrote to Judge Gordon at the time of these events in 1982, this matter would have been no more than a little misunderstanding that occurred five years ago, and of no consequence to the fitness of Robert Bork for the Supreme Court.

We urge anyone continuing to harbor any doubts about the events in *Vander Jagt* to read Judge Bork's letter and the attached documents. Of particular interest is a letter written by Judge Gordon to Judge Bork on December 17, 1982, soon after the very events which Judge Gordon now recalls "shocked" him. Judge Gordon closed his letter to Judge Bork with the following: "May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide season." As Judge Bork noted in his letter to the Committee:

> This is hardly the sentiment of one who thinks an attempt to dupe him has just been made." Indeed, Judge Bork added, "I do not recall receiving any criticism from either Judge Robb or Judge Gordon at the time for changing my view of the case or even for failing to inform Judge Gordon right away of this change. . . . I do believe that my memoranda of September 24 and October 8, coming just days after I sent out my draft opinion, fully explained the circumstances to Judge Gordon, and I had no reason to doubt—in fact, I gave the matter no thought—that he was satisfied by my explanation until his letter to the Committee nearly five years later.

Indeed, in his October 2 affidavit Judge Gordon confirms that he never discussed these events with Judge Bork.

But there is a fundamental point that should not be lost in the sorting out of these five year old events, and that concerns the nature of the appellate decisionmaking process. It is surprising that Judge Gordon or anyone familiar with this process could believe that "there was a design and plan in Judge Bork's actions and activities." Judge Bork in his letter to the Committee states:

> Of course, the very fact of sending a draft opinion to the other members of the panel, "for their review and comment," as I did in this case, is all that is often done by my court, and frankly, it is all that is or should be necessary. Not infrequently, I have received from other judges on my court draft opinions incorporating changes in rationale from that to which the panel had agreed at conference, and sometimes even a change in the result, without any separate explanation. And every opinion of the D.C. Circuit must circulate among all members of the court for a period of time before it may be issued. There is simply no possibility that any judge could change the law of the circuit surreptitiously. Even if that were possible, as it is not, the full court would simply grant the inevitable petition for rehearing *en banc* and put the law back in its prior position. Any judge who tried such a maneuver would cer-

tainly fail and would, moreover, forfeit forever the respect of his or her colleagues.

This explains why the ABA, *even accepting Judge Gordon's recollection of the events,* did not believe this amounted to anything. And we agree: Judge Bork's integrity has been wrongly impugned, but remains intact.

AMERICAN CYANAMID

Because it is an easy case to sensationalize, Judge Bork's opponents have made much of his opinion for a unanimous court, joined by then-Judge Scalia and Senior District Judge Williams, in *Oil, Chemical and Atomic Workers* v. *American Cyanamid Co.,* 741 F.2d 444 (D.C. Cir. 1984). Judge Bork's opponents imply or even claim that this opinion shows that he is hostile to the protection of women, and specifically that he endorses an employer's policy requiring women to undergo sterilization as a condition of employment. Judge Bork's testimony and his opinion full rebut this demagoguery.

In 1978, American Cyanamid determined that it could not reduce lead levels in the lead pigment department of one of its plants to a level that would be safe for the fetuses of pregnant workers. Ocupational Safety and Health Administration (OSHA) has taken the position that the Occupational Safety and Health Act requires employers to protect employees from harm to their fetuses, and the Court of Appeals for the District of Columbia Circuit has said that OSHA has authority to impose this requirement. *United Steelworkers of America* v. *Marshall,* 647 F.2d 1189, 1256 n. 96 (D.C. Cir.), cert. denied, 453 U.S. 913 (1981). Accordingly, the employer adopted a policy that only sterile women (or women past childbearing age) would be employed in this department. The employer informed the women who worked in the department of this policy, and of the availability of surgical sterilization as a way of complying with that policy. Faced with loss of their jobs or with transfer to lower-paying jobs, five of the women elected surgical sterilization in 1978. The employer closed the department in 1980.

Subsequently, the women and their union brought a title VII suit alleging that the sterilization policy constituted sex discrimination, and raising State law claims for intentional infliction of emotional harm and invasion of privacy. A Federal district court dismissed the State law claims as barred by the State statute of limitations, *Christman* v. *American Cyanamid Co.,* 578 F. Supp. 63 (N.D.W.Va. 1983), and the employer eventually settled the title VII suit with the women and their union.

Prior to this litigation, OSHA issued the employer a citation seeking a fine of $10,000 on the grounds that the employer's policy exposed the women to "recognized hazards" in violation of the Act. The Occupational Safety and Health Review Commission rejected OSHA's contention that the employer's policy constituted a "hazard" within the meaning of this particular statute. The Secretary of Labor could have petitioned the Court of Appeals for review of the Commission's decision on behalf of OSHA. But the Secretary declined to do so, and the appeal was brought instead by the union as an intervenor. The Secretary of Labor did not file a brief.

When the case came before Judge Bork and his colleagues in 983, the situation was this: the women had undergone sterilization me 5 years before, and there was no prospect that any other omen would be subjected to that policy. The sterilized women had btained a settlement of their title VII suit, thus obtaining some elief for the harm they had suffered. All that was at issue, from a ractical standpoint, was whether the employer would have to pay $10,000 fine to the Federal Government. And all that was at sue from a legal standpoint was whether the employer's policy olated the OSH Act—not whether that policy violated other Fed- al or State law.

Judge Bork made plain at the outset of his unanimous opinion at the women were "faced with a distressing choice" between rgical sterilization and loss of their jobs or reduced pay. 741 F.2d 445. Judge Bork noted that the "option of sterilization" was ne that the women might ultimately regret choosing," and ob- rved that the employer's policy raised "moral issues of no small mplexity." Id. But, Judge Bork explained, the court was not "free make a legislative judgment." The issue was whether, under the rcumstances presented, the employer's policy constituted a azard" within the meaning of the Act, and the court held that it d not.

In reaching that conclusion, Judge Bork acknowledged that the nployer's "policy may be characterized as a 'hazard' to female nployees who opted for sterilization in order to remain in the In- ganic Pigments Department, though it requires some stretching call the offering of a choice a 'hazard' to the person who is given e choice." 741 F.2d at 448–449. To see whether this "stretching" the statutory language was consistent with congressional intent, dge Bork looked to analogous cases interpretating similar lan- age, and to the legislative history of the Act, which indicated at Congress was concerned with protecting employees from air llutants, industrial poisons, unsafe working conditions, and the e. Accordingly, he concluded, as had the Commission, that "rec- nized hazards" did not ordinarily include "a policy as constrasted th a physical condition of the workplace." Id. at 448.

Judge Bork could have rested the decision solely on this basis, t instead he narrowed the employer's victory considerably. He k judicial notice of the fact that an administrative law judge d found in a related proceeding that it was not economically fea- le for the employer to lower the lead level to a certain point—a int that was well above the level that would endanger fetuses. rther, the Court of Appeals had ruled in *United Steelworkers,* 7 F.2d at 1295, that OSHA's proposed standard for the lead pig- ent industry—which would have covered the pigment depart- ent—was *technologically* infeasible. Yet that lead standard, al- ough safe for employees, would still have resulted in lead levels at would be unsafe for fetuses. Therefore, it was apparent that e employer could not have reduced the lead level in the depart- ent to remove the threat to fetuses. On this basis, Judge Bork rrowed the court's ruling by stating that "[t]his case might be fferent if American Cyanamid had offered the choice of steriliza- n in an attempt to pass on to its employees the cost of maintain-

ing a circumambient lead concentration higher than that permitted by law." 741 F.2d at 450.

Moreover, it should be noted that the union made an important concession that reveals how narrow the dispute really was. In addition to the fact that "the company could not have been charged under the Act if it had accomplished [fetal protection] by discharging the women or by simply closing the Department," 741 F.2d at 449, counsel for the union conceded at oral argument that "there would have been no violation if the company had simply stated that 'only sterile women' would be employed in the Department because there would then have been no 'requirement' of sterilization." 741 F.2d at 450. As Judge Bork pointed out, this statement would also have given the women the option of sterilization, but without informing them that that option existed or how to pursue it. Thus, the union's concession supplied additional support for the court's decision, because "[i]t cannot be that the employer is better shielded from liability the less information it provides." Id. at 450.

In sum, it is indisputable that Judge Bork's unanimous opinion reflects sympathy for these women rather than hostility to them. As he wrote, "[t]he women involved in this matter were put to a most unhappy choice." 741 F.2d at 450. As he also noted, the employer's policy might violate federal labor law or title VII. Id, at 450 n. 1. In the case before the court, however, OSHA and the union had used the wrong law—seeking to expand the scope of a worker safety law to encompass employer policies rather than workplace hazards.

In his testimony before the Committee, Judge Bork made it as plain as is humanly possible that he appreciated the distressing predicament the women were confronted with. When he was first questioned about the case Judge Bork was asked how "you as a jurist could put women to the choice of work or be sterilized." Judge Bork responded to this question by explaining his reasoning, and he specifically noted that the company was confronted with "unattractive alternatives" and that the women were "faced with a distressing choice."

Judge Bork also pointed out that his colleagues, and the Review Commission, agreed with him and thus "did not think it was an outrageous case. And it was a matter of statutory interpretation, not a matter of constitutional law, and I suppose the five women who chose to stay on that job with higher pay and chose sterilization—I suppose that they were glad to have the choice—they apparently were—that the company gave them." Read in context, it is obvious that Judge Bork did not mean that the women were happy to have this "distressing choice." He meant that they apparently preferred that choice, at the time, to having no choice—to simply being fired or transferred to lower-paying jobs, as the employer could have done without violating the Act.

Nevertheless, an attempt was made to treat Bork's statement as proof of a malevolent hostility to women. One of the sterilized women, Ms. Betty Riggs, was solicited by her attorney in the *American Cyanamid* case to send in as telegram dictated by the attorney. When this telegram—in which Ms. Riggs expressed her disbelief that "Judge Bork thinks we were glad to have the choice of

getting sterilized or getting fired"—was read to Judge Bork, he made it unmistakably plain that he thought no such thing:

> That was certainly a terrible thing for that lady, and it was certainly a terrible choice to have to make. Of course the only alternative was that she would have been discharged and had no choice.
>
> I think it was a wrenching case, a wrenching decision for her, a wrenching decision for us, but the entire panel agreed on—the OSHA review commission agreed with us, agreed that it was not a violation of the hazardous conditions provision of the statute.

Further, in a colloquy with Senator Hatch the following day udge Bork stated: "I would not want to be an official of that company trying to make that choice. I wouldn't want to be a worker aced with the choice. And fortunately, as judges, we were not aced with that choice." Judge Bork once again explained the reaoning that led the court to its unanimous conclusion, and concluded: "there is some thought that we approved a policy. We did not." No objective reader of Judge Bork's opinion, or of his testimony, ould reasonably reach a contrary conclusion. Judge Bork's response regarding the inaccurate treatment of the *American Cyanamid* case is attached as appendix N.

CONCLUSION

As these views indicate, Judge Robert Bork is eminently qualied by ability, integrity, and experience to serve as Associate Jusce of the Supreme Court. The failure of the Senate to confirm im will be a failure larger than simply denying one qualified ominee a place on the Court. It will be a disservice to the process y rewarding those who have turned the nominating process into a egative campaign of distortions; it will be a disservice to the judiary of this country who should not be forced to endure such a poticized process; and most importantly, it will be a disservice to the merican people, who not only will be denied the service of this tellect on the Court, but will also see the judiciary have its indendence threatened by activist special interest groups.

MINORITY VIEWS OF MESSRS.

STROM THURMOND.
ORRIN G. HATCH.
ALAN K. SIMPSON.
CHARLES E. GRASSLEY.
GORDON J. HUMPHREY.

APPENDIX A

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, March 18, 1976.

MEMORANDUM FOR THE PRESIDENT

If there is to be a reconsideration of the pocket veto matter, I trust the following items will be taken into consideration:

1. Your decision in October, 1975 was that the President would only utilize the pocket veto following a sine die adjournment at the end of a Congress, provided the Congress had left authorized agents to accept return vetoes.

2. The position of the Administration on this matter was a factor in the decision not to seek certiorari in the case of Kennedy v. Sampson. The failure to seek certiorari was the subject of public criticism at that time, centering on the Solicitor General. It would be difficult for the Solicitor General, himself, although not his office, to take a different position in the present case of Kennedy v. Jones. This is a factor which does not increase the chance of success in the Supreme Court.

3. While I must recognize that there can be a difference of view, as to the probable outcome in the Supreme Court, between the position taken by the Attorney General and the Solicitor General, and the position now taken by the Counsel's Office, our view remains that the pocket veto during intra-session and inter-session recesses or adjournments cannot be justified as consistent with the provisions of the Constitution. We believe the result would be a loss in the courts which would not be helpful to the President's position. We believe this risk is a considerable one and hard to justify publicly as arising out of a desire to make the machinery of government work better.

4. The argument that the pocket veto is rooted in the early practice of long congressional absences, and that it must remain rigidly unaltered under changed conditions of rapid transportation and communication, does not seem to us likely to persuade the Court. This is particularly so since the last Supreme Court pronouncement on the topic, in the Wright case, casts doubt upon part of the basis for the old practice.

5. We are deeply troubled that the present case if continued will result in a ruling on standing which will be harmful, since this is the most appealing case to give standing to members of Congress. We believe this would be a most unfortunate development, coming at a time when in other types of situations the Supreme Court has begun to modify in a more conservative direction its position on standing. Thus we do not agree with the Counsel's Office that "concerned individuals can almost always be found to produce a test case."

Attorney General

APPENDIX B

OFFICE OF THE SOLICITOR GENERAL,
Washington, DC, January 26, 1976.

January 26, 1976

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: SOLICITOR GENERAL RHB

RE: POCKET VETOES

Recommendations: (1) We recommend that the Attorney General be authorized to make the following public announcement on behalf of the President:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

(2) In accordance with the position expressed in the foregoing announcement, we further recommend that the Department of Justice be authorized to accept judgment in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.).

This recommendation is based upon our analysis of constitutional policy as well as our estimate of the likely outcome of litigation. This memorandum first sets out a Summary of its analysis and then in more detail discusses (1) the text and apparent policy of the Constitution, (2) pertinent judicial decisions, and (3) possible objections to our recommendations.

SUMMARY

The constitutional text limits the use of the pocket veto to circumstances in which Congress, "by their Adjournment," has prevented use of the return veto. The constitutional question is, therefore, when does Congress' adjournment prevent the President from returning a bill with his objections. As a matter of pure logic, the answer to that question would be (1) during a recess when no agent of

the originating House is available to accept the return and (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other circumstances, Congress could consider the President's objections to the bill and complete the legislative process by sustaining or overriding the veto. Although the history of the Constitutional Convention sheds little further light on this matter, it is apparent that the Framers intended the President to exercise only a qualified negative over legislation and did not contemplate an expansive reading of the Pocket Veto Clause.

The judicial history of the Clause introduces some confusion, however. In The Pocket Veto Case, the Supreme Court sanctioned the use of the pocket veto during a long inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But just nine years later, in Wright v. United States, the Court sanctioned the use of the return veto during a shorter intra-session recess of the originating House, and in doing so significantly, although in part implicitly, retracted much of its analysis in the earlier case. At a minimum, Wright stands for the proposition that a veto may be returned to an accredited agent of the originating House while that House is not in session. In Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit extended the Supreme Court's reasoning in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress. We believe that decision was correct. The Constitution requires the unsigned bill to be returned to the originating House; if, as in Wright, the temporary absence of the originating House does not prevent a return, we see no reason why the simultaneous absence of the nonoriginating House should change that result.

The case now pending in the District Court for the District of Columbia, Kennedy v. Jones, involves the use of pocket vetoes during (1) a somewhat longer (32-day) intra-session adjournment of Congress and (2) an inter-session adjournment. We do not believe that the length of the intra-session adjournment can be constitutionally significant under modern conditions, so long as an agent remains behind who is authorized and available to receive a return veto. Nor do we regard the difference between intra-session and inter-session adjournments to require a difference in constitutional practice; in both situations the same Congress that passed the bill would, upon reconvening, be able to consider the President's objections and determine whether they should be sustained or overridden; in those circumstances the return of the bill would not appear to have been prevented within the meaning of the Pocket Veto Clause.

I. Constitutional Text and Policy

The second paragraph of Article I, Section 7, of the Constitution provides in relevant part as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law * * * If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in the like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Were we construing the Constitution afresh, neither enlightened nor encumbered by later judicial gloss, it would appear obvious that the return veto is required in all cases where Congress has not made its use impossible. The normal course of interaction between a Congress and a President who disagree is prescribed as: legislation, return veto, attempt to override. The President thus has a qualified negative over legislative acts. The pocket veto exists solely to prevent Congress from depriving the President of that qualified negative and so leaving the legislative power completely unchecked.

The return veto requires Congress to muster a two-thirds majority to override. The pocket veto, by requiring Congress to reenact the legislation and then muster a two-thirds majority to override a subsequent return veto, thus requires congressional consideration of the same measure not two but three times before the President's qualified negative may be overcome. There can be no justification for placing that burden on the process except that Congress itself has made it inevitable by preventing the use of the return veto.

This said, it follows that the use of a pocket veto is improper whenever a return veto is possible. The pocket veto is not properly viewed, in the constitutional design, as a presidential prerogative; it is, rather, a narrowly limited

presidential defense to the exercise by Congress of the latter's own prerogative, "by their Adjournment," to prevent the return of an unsigned bill.

The constitutional question, then, is when is a return veto impossible, when does "Congress by their Adjournment prevent [a bill's] Return." The Constitution does not answer explicitly, but the plain indication that the return veto is heavily preferred and the practical construction that should be given the concept of impossibility argues that the pocket veto is proper in only two circumstances: (1) during an intra-session or inter-session recess when no officer or designated agent of the House in which the bill originated is available to accept the return; or (2) when a Congress, for either House of it, has finally adjourned so that the Congress that next meets will not be the same legislative body.

The procedures required (or not required) by Article I, Section 7, support these conclusions. The President is required to return the bill within ten days (Sundays excepted), but there is no time limit, express or implied, placed upon the obligation of the House to which the bill is returned to "enter the Objections at large on their Journal, and proceed to reconsider" the bill. This suggests that the length of an adjournment or recess is irrelevant to the question of whether a return or a pocket veto is appropriate. The relevant consideration is the ability of the President to make the return. (It is also true that only when a Congress has ended would it be impossible for a House to "proceed to reconsider.")

It has been contended that a return veto is impossible unless the originating House is in session. The constitutional text imposes no such requirement, however, and there is no apparent reason why it should be implied. The bill is required to "be presented to the President of the United States," but it has never been doubted that his agent at the White House may accept the presentation and that the President's ten days begins to run then, even if he does not return to the White House or even to the country during that period. There being no time limit upon the reconsideration of a vetoed bill by the originating House, there is even less reason to suppose that the return veto cannot be made to its officer or agent for action when that House reassembles.

Finally, it should be noted that the constitutional text does not prescribe a time limit for the period between the passage of a bill and its presentation to the President. Thus, were it supposed that the President had a power to pocket veto a bill because the tenth day fell during a recess or adjournment, Congress could defeat the power by leaving a bill with an officer instructed to present it to the President nine days before the end of any recess or adjournment.

This fact reduces the argument for the power to pocket veto during intra-session or inter-session recesses or adjournments to the level of constitutional triviality. The power would arise only by accident, oversight, or when Congress preferred a pocket veto to a return veto. These are not considerations that rise to the level of constitutional argument.

The legislative history of the veto provisions, though by no means conclusive, tends to confirm the argument from the text. There is abundant evidence from the proceedings of the Constitutional Convention, and from other sources, that the Framers viewed any veto as a limited exception to their basic legislative scheme according ultimate authority over the passage of federal legislation to the Congress. The absolute veto power that had been possessed by the King of England and by many of the colonial governors had been a major source of friction between the Colonies and England during the pre-revolutionary period, and efforts to confer a like power upon the President were expressly rejected by the Framers. See 1 M. Farrand, The Records of the Federal Convention of 1787 (1937 ed.), at pp. 104, 106; 2 M. Farrand, at pp. 71, 200, 301, 582, 585.

At the same time, however, the Framers were apparently convinced that the power to enact laws for the governance of the Nation was of too great a magnitude to allow it to be given to the legislative branch without any checking or balancing provisions. They therefore conferred upon the President the power to exercise a "qualified negative" (see the Federalist, No. 69) over proposed legislation, a negative requiring the Congress to reconsider bills of which the President disapproved but which could be overridden by a two-thirds majority of both Houses. The history of the clause thus clearly counsels a narrow construction of the occasions for its exercise (see e.g., 1 J. Story, Commentaries on the Constitution of the United States §891 (5th ed., 1905). This view of the veto as a qualified negative does not support an expansive view of the scope of presidential power to use the pocket veto.

II. Judicial Decisions

The Supreme Court has addressed the scope of the Pocket Veto Clause on only two occasions -- in The Pocket Veto Case, 279 U.S. 655 (1929), and Wright v. United States, 302 U.S. 538 (1938). Since on neither occasion did the Court undertake an exhaustive examination of the circumstances in which use of the pocket veto would be constitutionally appropriate, many questions are left open to debate. Moreover, some of the Court's rationale in The Pocket Veto Case appears

inconsistent with the text and history of the relevant constitutional provisions and, indeed, with some of the Court's rationale in the subsequent Wright decision.

Although the holding in The Pocket Veto Case might well be affirmed were the Court presented in the future with a case involving the same facts, we do not believe -- given the significantly different approach to the Pocket Veto Clause embraced in Wright -- that the Court's original rationale would survive intact. Indeed, portions of that rationale were either directly or indirectly rejected in Wright. The Court's opinion in the latter case strongly suggests, in our judgment, that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress so long as (1) appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment and (2) the length of the adjournment did not exceed the lengths of adjournments that have become typical in modern times. We think it likely, moreover, that the Court might drop the second factor, i.e.,that the length of the adjournment might be held irrelevant and thus not a reason for allowing the use of a pocket veto.

A. The Pocket Veto Case. The Supreme Court held in The Pocket Veto Case that the inter-session adjournment of both Houses of the 69th Congress, which lasted for approximately five months, had prevented the President from returning with his objections a bill that had been presented to him eight days before the adjournment. The Court thus rejected the contention made by the petitioners and the amicus curiae that the President's failure to return the bill to the Congress, with his objections, within ten days of its having been presented to him had resulted in its having become a law without his signature.

The principal factors relied upon by the Court in support of this holding were that (1) the word "House" appearing in the second paragraph of Article I, Section VII, of the Constitution requires that the House in which the bill originated be "in session" on the tenth day following the bill's presentation to the President, and that appointment by that House of an officer or other agent authorized to receive presidential messages during the adjournment therefore would neither prevent the President from exercising a pocket veto nor empower him to exercise a return veto after the originating House had adjourned; (2) the return of a bill disapproved by the President during an inter-session adjournment of the Congress would produce precisely the sort of delay in the bill's final disposition, and uncertainty concerning its status prior to Congress' having reconvened, that the relevant constitutional provisions were designed to

prevent; and (3) the use of a pocket veto in the circumstances presented by the case was consistent with "the practical construction that has been given to [the relevant provisions] by the President through a long course of years, in which the Congress has acquiesced" (279 U.S. at 688-689).

If extended to its logical conclusion, the reasoning employed by the Court in The Pocket Veto Case would have led ultimately to the conclusion that whenever the originating House is in recess at the end of the tenth day (excluding Sundays) following presentation of a bill to the President, the withholding by the President of his signature would prevent the bill from becoming a law. This conclusion would have followed without regard to the brevity of the recess, the availability of reliable and efficient means of returning the bill to the originating House with the President's objections, or the willingness of the Congress as a whole promptly to reconsider the bill following its return. Thus, had the originating House recessed simply for the afternoon of the tenth day following the presentation of a particular bill, the logic of the Court's reasoning in The Pocket Veto Case would have required it to sustain the President's pocket veto.

The only alternative would be to make the veto's effectiveness turn upon the length of the recess, but this would require the Court arbitrarily to assign a limit to the length of a recess during which a return veto could be required. There is no warrant for such a procedure in the Constitution.

B. Wright v. United States. The petitioner in Wright attempted to take advantage of the logic of the Court's reasoning in The Pocket Veto Case, and contended that a particular bill had become a law because (1) it had been return vetoed by the President during a three-day intra-session recess taken by the Senate, the originating House, and (2) no pocket veto could have been exercised during that period since Congress as a whole had not adjourned within the meaning of the phrase "unless the Congress by the Adjournment prevent [the bill's] return." In rejecting these contentions, the Supreme Court pointed out that if a messenger may "present" a bill to the President while the President is temporarily absent from the White House and if the same bill may be returned by messenger to the originating House with a statement of the President's objections, the "plainest practical considerations" suggest that the return veto may be received by "an accredited agent" of the originating House (302 U.S. at 590). The Court also noted that the dangers it had apprehended in The Pocket Veto Case, stemming from delay in the final disposition of a bill disapproved by the President and undertainty concerning its status following the return veto, are illusory when the originating House has taken "a mere temporary recess" (id. at 595).

Although the Court in Wright did not expressly disavow ary part of the opinion in The Pocket Veto Case, it did feel ccmpelled to repeat Chief Justice Marshall's admonition "'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used * * *'" (id. at 593). As Justice Stone, who would have held that the President's failure to sign the bill in question had prevented its becoming a law, noted in his concurring opinion (which was joined by Justice Brandeis), however, the Court's opinion in Wright reflected a significantly different approach to the Pocket Veto Clause than had been employed in The Pocket Veto Case (see id. at 598-609). Specifically, (1) the Court held in Wright that the President's return veto had been effective despite the fact that at the time of the return the originating House was not "in session"; (2) it approved the return of a vetoed bill to "an accredited agent" of the originating House, even though that House had not specifically authorized an agent to receive return vetoes during the recess and despite the Court's statement in The Pocket Veto Case that "the delivery of the bill [being returned] to [an] officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate" (279 U.S. at 684); and (3) it refused to permit its decision to be influenced by past executive or congressional practice, noting that "[t]he question now raised has not been the subject of judicial decisions and must be resolved not by past uncertainties, assumptions or arguments, but by application of controlling principles of constitutional interpretation" (302 U.S. at 597-598). Wright undercut much of the rationale of The Pocket Veto Case and left the law in some confusion.

C. Kennedy v. Sampson. A close reading of the Supreme Court's opinions in The Pocket Veto Case and in Wright reveals a rather dramatic shift of emphasis in the latter in favor of essentially practical considerations. This shift of emphasis figured significantly in the recent decision of the Court of Appeals for the District of Columbia Circuit in Kennedy v. Sampson, 511 F. 2d 430 (1974). The court of appeals held in Kennedy that the Christmas recess taken by both Houses of the 91st Congress had not prevented the President from exercising return vetoes during that period and that the President's failure to sign or to return veto a particular bill during the recess had resulted in the bill's having become a law without his signature. The court relied heavily upon the practical considerations discussed in Wright in concluding that neither the length of the Christmas recess (five days for the originating House, as opposed to the three days involved in Wright), nor the fact that (unlike the situation in Wright) both Houses of the Congress were in recess on the tenth day (excluding Sundays) following presentation of the bill to the President, had empowered the President to exercise a pocket veto.

The court of appeals began its analysis "with the premise that the pocket veto power is an exception to the general rule that Congress may override presidential disapproval of proposed legislation" (511 F. 2d at 437). The Pocket Veto Clause was thus viewed as "limited by the specific purpose[s] it [was] designed to serve" (ibid.); the court reasoned that the clause was to be construed in a manner that frustrated neither of the "fundamental purposes" that had been identified by the Supreme Court in Wright (id. at 438; quoting from Wright, supra, 302 U.S. at 596):

> (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. * * *

The only aspect of the rationale of the decision in The Pocket Veto Clause not modified by the decision in Wright concerned the constitutional significance of delay in a bill's final disposition and public uncertainty regarding its status prior to Congress' having reconvened. The court of appeals in Kennedy brushed this consideration aside, noting that, "[p]lainly, intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the Pocket Veto Case" and that "[m]odern methods of communication make it possible for the return of a disapproved bill to an appropriate officer of the originating House to be accomplished as a matter of public record accessible to every citizen" (511 F. 2d at 411). The court concluded that use of the return veto during an intra-session adjournment would create no intolerable public uncertainty (ibid.; footnotes omitted):

> [The] return of a bill during an intra-session adjournment * * * generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session. The only possible uncertainty about this situation arises from the absence of a definitive ruling as to whether an intrasession adjournment "prevents" the return of a vetoed bill. Hopefully, our present opinion eliminates that ambiguity.

The court of appeals left little doubt in Kennedy that it would hold that the President is not constitutionally empowered to pocket veto proposed legislation during an intra-session recess, whatever its length, so long as the originating House had authorized an officer or other agent to

receive presidential messages during its absence. Since we can not perceive any basis in constitutional text or policy for distinquishing between an intra-session recess and an inter-session adjournment, we believe that that court would extend its holding to inter-session adjournments as well.

Although we were somewhat troubled by the breadth of the court of appeals' opinion in Kennedy, for a variety of reasons we determined not to petition for a writ of certiorari in that case. First, the result in the case seemed to us to be unquestionably correct. Consequently, were we to have sought further review we would have been in the untenable position of agreeing with the actual holding in the case and with much of the court's reasoning, and of asking the Supreme Court merely to disapprove certain dicta. Second, it was our understanding that, by the time the decision in the Kennedy case was issued, executive policy with respect to pocket and return vetoes either accorded with that decision or would be modified accordingly. And, finally, we regarded the case to be a particularly inappropriate vehicle for presenting to the Supreme Court the question of congressional standing to sue -- a question the Court obviously would have had to reach prior to dealing with the merits of the case.

D. Pending Litigation. Although pocket vetoes have been used many times during intra-session and inter-session adjournments (see The Pocket Veto Case, 279 U.S. at 690-691; Kennedy v. Sampson, 511 F. 2d at 442-445), there have been very few cases challenging the constitutionality of the practice. A partial explanation for this is that development of the doctrine of congressional standing to sue is a relatively recent phenomenon. We may expect litigation with congressmen over every future use of the pocket veto during an adjournment that is not final. Such cases are particularly poor vehicles for litigating the question of congressional standing to sue. The Supreme Court might be greatly tempted to hold that there is standing in order to reach the veto issue and settle it. The dispute concerning congressional standing will, in the long run, pose a much more serious threat both to traditional executive prerogative and to constitutional modes of goverance than does acceptance of a narrowed scope for the pocket veto power -- particularly since Congress can completely frustrate the use of the pocket veto during other than final adjournments by the simple expedient of delaying the presentation of bills until their return dates coincide with times when the originating House, or both Houses, are scheduled to be in session.

We therefore believe that judgment on the merits should be accepted in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.) -- a suit filed by Senator Kennedy and involving two pocket vetoed bills. The first bill (H.R. 10511) would have amended the Urban Mass Transportation

Act of 1964 to permit buses purchased pursuant to that Act to be used to provide charter bus services. The bill was pocket vetoed by President Nixon during the sine die adjournment of the 1st Session of the 93d Congress, which lasted 29 days. The second bill (H.R. 14225) would have amended the Vocational Rehabilitation Act by extending the authorization of appropriations for certain programs for the handicapped for one year, making certain changes in federal programs for blind persons and providing for the convening of a White House Conference on Handicapped Individuals. President Ford pocket vetoed the latter bill during a 32-day intra-session recess taken by both Houses of the 93d Congress. The Congress subsequently passed bills identical to those that had been pocket vetoed, and they were ultimately signed into law, so that nothing of any significance other than legal issues is now at stake.

We therefore argued in Kennedy v. Jones that that case is moot. That argument has failed. We must now accept judgment and make the recommended public announcement on behalf of the President or continue to litigate the case. If we litigate, we are certain to lose both the standing issue and the pocket veto issue in the court of appeals. Nothing would be gained by litigating further unless we went to the Supreme Court. Either we or Senator Kennedy may attempt to bypass the court of appeals by petitioning the Court for certiorari before judgment. The case could be argued as early as next October. In any event, we believe we would run a very substantial risk of losing the congressional standing issue in the Supreme Court in this context and, if we did, would almost certainly lose the pocket veto issue. Further litigation risks much for very little prospect of gain.

III. Possible Objections to Restricting Use of the Pocket Veto to Final Adjournments of the Congress

Several possible objections have been raised to the recommendation that the President use pocket vetoes only upon the final adjournment of a Congress if, during all other recesses and adjournments, agents have been designated to receive return vetoes. The more important of these objections are analyzed here.

A. The decided cases support a distinction between intra-session recesses and inter-session adjournments, making it inadvisable for the President to surrender the power to pocket veto proposed legislation during inter-session adjournments.

We cannot perceive any basis in constitutional text or policy for distinguishing between an intra-session recess and an inter-session adjournment. The Court suggested in Wright that the determining factor so far as the permissibility of a pocket veto is concerned is the length of time the originating House is scheduled to be absent from its chambers, the consequent delay in the bill's final disposition, and public uncertainty concerning the bill's status prior to Congress' having reconvened. In recent years, however, inter-session adjournments have not consistently or significantly exceeded intra-session recesses in length. Indeed, the intra-session recess involved in Kennedy v. Jones was slightly longer than the inter-session adjournment in that case, which would make it particularly futile to urge the distinction suggested.

B. Although the President might not be "prevented" from returning a bill if only one House has temporarily recessed or adjourned, the temporary absence of both Houses might be held to prevent the bill's return.

The Supreme Court did state in Wright that, since the House of Representatives (the non-originating House in that case) had remained in session during the three-day recess taken by the Senate, the "Congress" had not adjourned and thus prevented "by their Adjournment" the return of the bill in question within the period prescribed for that purpose. But that observation was not accorded controlling weight by the Court since it simultaneously reserved the question whether a one-House recess longer in duration than the recess involved in that case would "prevent" the return of a vetoed bill. As Justice Stone pointed out in his concurring opinion in Wright, moreover, "it was the adjournment of the originating house with which the framers were concerned" (302 U.S. at 606). See also Kennedy v. Sampson, supra, 511 F. 2d at 440.

The distinction between a recess by one House and a recess by both is, in any event, of no particular significance if the important factors are, as those who make this point assume, the length of the recess and the unavailability of an originating House in session to receive a return veto.

C. Since the Supreme Court's holding in Wright was limited to disapproving a pocket veto exercised during a three-day recess, and the Court did not in that case disavow the discussion in The Pocket Veto Case concerning the constitutional significance of the delay and uncertainty inhering in longer recesses and adjournments, the President should continue to pocket veto bills of which he disapproves during congressional absences in excess of three days.

We believe that this objection was answered persuasively by the court of appeals in Kennedy v. Sampson. The recesses and adjournments taken by the Congress during recent years have not approached in length those taken at the time The Pocket Veto Case was decided. Moreover, the Congress may delay the presentation of an enrolled bill to the President until near the end of even a very long recess or adjournment -- and then need not reconsider the disapproved bill within any given period of time or, indeed, at all.

Finally, until the Congress has reconsidered the disapproved bill, and either sustained or overridden the President's veto, there will be public uncertainty concerning whether the bill will become a law. That uncertainty is no greater than in cases where Congress dawdles over the original passage of a bill or over an attempt to override a return veto. Indeed, it is hard to see what public uncertainty has to do with the issue at all. In the case of a return veto during a recess or adjournment, the public knows the bill has not become law and will not unless and until Congress overrides. Why that is of any concern, much less a factor of constitutional dimensions, remains a mystery. The Supreme Court mentioned it once but the argument about uncertainty will not withstand analysis. We therefore do not think the fact that an accredited agent of the originating House may have to hold a returned bill for a short period of time prior to the reconvening of the originating House has any significance under the Pocket Veto Clause.

D. Requiring the originating House specifically to authorize an officer or other agent to receive return vetoes during the temporary absence of that House from its chambers has no predicate in the text of the relevant constitutional provisions and does not distinguish earlier cases or practice.

The principal difficulty that must be faced in any attempt presently to delimit the scope of the Pocket Veto Clause is that the Supreme Court has complicated the inquiry with opinions

that are not completely reconcilable and, as a consequence, past executive practice with respect to return and pocket vetoes has not been entirely consistent. It is true that the Secretary of the Senate, to whom the Court held in Wright an effective return of the President's veto had been made during the Senate's three-day absence, had not been specifically authorized by the Senate to receive such vetoes. That fact obviously poses a problem in using the specific designation of an agent as a limiting principle for purposes of the Pocket Veto Clause. We also agree that, were determination of the scope of the Pocket Veto Clause a matter of first impression, the designation of an agent would be unnecessary if officers of the originating House were available.

We nevertheless believe that the chances are quite good that the Supreme Court would endorse the specific designation of an officer or other agent to receive return vetoes as a means of distinguishing past executive practice (and avoiding the resurrection of bills long since regarded as having been effectively pocket vetoed) and of providing guidance for the future. Clearly, a case-by-case determination of the effectiveness of pocket and return vetoes -- depending upon the length of the particular recess or adjournment -- would be entirely unsatisfactory. An approach to the Pocket Veto Clause requiring the Court to endorse a recess or adjournment of a specific length as permitting the President to return veto a bill would be both inconsistent with the Court's normal practice and exceedingly difficult to rationalize. Specific designation of an agent by the originating House at least evidences an effort by that House to keep open lines of communication with the President during temporary absences, and provides formal assurance that the Congress as a whole will receive formal notification upon its return of decisions made by the President with respect to specific legislation.

E. A determination by the President that he will return rather than pocket veto bills presented to him during temporary recesses and adjournments may result in the resurrection of bills pocket vetoed in the past.

Since we believe that the Supreme Court would refuse to recognize the effectiveness of a pocket veto exercised during a temporary recess or adjournment no longer in duration than those that have become common in recent years, so long as an officer or agent had been authorized by the originating House to receive presidential messages during that period, the danger that bills pocket vetoed in the past may suddenly spring to life confronts us regardless of present or future executive policy with respect to pocket vetoes. An attempt should be made promptly to identify bills that may be affected by various alternative theories of the Pocket Veto Clause, although we believe that the Supreme Court

would view sympathetically an argument that any future decision by it concerning the scope of the Pocket Veto Clause should be applied prospectively only.

F. A construction of the Pocket Veto Clause prohibiting the President from pocket vetoing bills during a temporary recess or adjournment creates a danger that the circumstances attending the President's decision to return veto a particular bill will have changed dramatically by the time the Congress has reconvened.

Since the Constitution does not place any limits upon the Congress' power to delay the presentation of an enrolled bill to the President, the danger that circumstances may change between the time of the President's consideration of a bill and Congress' reconsideration of that bill is unavoidable.

G. It is unrealistic to believe that the President can adopt the position that pocket vetoes are impermissible except following a final adjournment of the Congress without destroying the ability of his successors to assert the contrary.

We agree that a practice of using return vetoes instead of pocket vetoes will make it more difficult for a later President to use pocket vetoes. If the use of return vetoes is the sounder constitutional practice, however, that is not an objection but a proper result. The significance of this consideration is, in any case, substantially undermined by the very probable outcome of a Supreme Court test of the scope of the Pocket Veto Clause.

APPENDIX C

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, January 29, 1976.

THE PRESIDENT,
The White House, Washington, DC.

Dear Mr. President:

The Department of Justice is presently involved in a case which raises the question whether a President may lawfully use a pocket veto during intra-session and inter-session adjournments of Congress. That case, Kennedy v. Jones, is now pending in the District Court for the District of Columbia and concerns two bills which were pocket vetoed, the first by President Nixon during the sine die adjournment of the 1st Session of the 93rd Congress, which lasted 29 days, and the other by you during a 32-day intra-session recess taken by both Houses of the 93rd Congress. The bill pocket vetoed by President Nixon would have amended the Urban Mass Transportation Act of 1964 to permit buses purchased pursuant to that act to be used to provide charter bus services. The bill which you pocket vetoed would have amended the Vocational Rehabilitation Act in connection with certain programs for the handicapped. Congress has since passed bills identical to the bills which were pocket vetoed, and they have been signed into law.

After extensive consideration of the issue, and based on an examination of the judicial decisions construing the Pocket Veto Clause of the Constitution and the policy behind it, I have concluded that it is extremely unlikely that we will prevail in our contention that the bills involved in the Kennedy case were lawfully pocket vetoed. In addition, I am of the opinion that continued use of the pocket veto during intra-session and inter-session recesses or adjournments, where the appropriate House of Congress has specifically authorized an officer or agent to receive return vetoes during such periods, cannot be justified as consistent with the provisions of the Constitution. I therefore recommend that the Department of Justice be authorized to accept judgment on the merits in the Kennedy case, and also that I be authorized to make the following statement on your behalf:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that

the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

Because of the importance of this issue, I am attaching the memorandum of the Solicitor General discussing in detail the legal basis for my recommendation, the problems posed by continuation of the Administration's present policy regarding the pocket veto, and the possible objections to my recommendation. The Department's position may be summarized as follows:

The Pocket Veto Clause of the Constitution, Art. I, Sec. 7, provides that the pocket veto may only be used in cases in which the Congress, "by their Adjournment," has prevented the use of the return veto. Such cases would appear to exist only (1) during a recess when no agent of the originating House is available to accept the return, or (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other cases, Congress would in fact be able to consider the President's objections and complete the legislative process by overriding or sustaining the veto. This construction is in accord with the clear intent of the Framers that the President exercise only a "qualified negative" (See the Federalist, No. 69) over proposed legislation, and not the "absolute negative" implicit in the pocket veto. It is also in accord with the original and limited purpose of the Pocket Veto Clause -- to enable the President to veto a bill in those extraordinary cases where Congress seeks to deprive him of the veto power by adjourning and thus preventing the return of an unsigned bill.

Although the judicial decisions construing the Clause are less than satisfactory, they nevertheless appear to support the above position. In the Pocket Veto Case, the Supreme Court approved the use of a pocket veto during a five-month inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But later in Wright v. United States, the Court, although approving the use of a return veto during a shorter intra-session recess of the originating House, established that a veto may be returned to an accredited agent of the originating House even if it is not in session. Recently, in Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit construed the Supreme Court's decision in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress.

It is our view that the Kennedy v. Sampson decision was correct, and that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress if appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment.

There would not appear to be any advantage in continuing to maintain our present position regarding pocket vetoes in the Kennedy v. Jones case. As I have mentioned, our chances of success are remote, and our position is not constitutionally sound. Moreover, continuation of the litigation may risk an adverse decision on the question of congressional standing, an issue also presented by the case. There is the danger that the Court's desire to reach the merits of the case may constitute an irresistible temptation to decide the standing question in favor of Senator Kennedy. Since this later issue is of considerable importance, it would seem advisable to await a more favorable case on the merits from the Executive's position before presenting the congressional standing issue to the Court.

I would, of course, be glad to discuss this matter with you. Because of the status of the litigation, it is important that this matter be decided as soon as practicable.

Sincerely,

EDWARD H. LEVI,
Attorney General.

APPENDIX D

SHEARMAN & STERLING,
New York, August 7, 1987.

Mr. BENJAMIN C. BRADLEE,
Executive Editor, The Washington Post, Washington, DC.

Dear Sir:

I am Immediate Past Chairman of the Section of Antitrust Law of the American Bar Association. I write this letter on behalf of myself and the previous Chairmen of the Section listed below.* We write to take issue with Colman McCarthy's criticisms in his article of July 12, 1987 stating that Judge Robert Bork's views on antitrust law are "over the edge" and anticonsumer.

To the contrary, Judge Bork's writings in this area have been among the most influential scholarship ever produced. While not all of us would subscribe to its every conclusion, we strongly believe that The Antitrust Paradox, which he published in 1978, is among the most important works written in this field in the past 25 years.

It is indicative of the value of Judge Bork's contributions that The Antitrust Paradox has been referred to by the United States Supreme Court and by the U.S. Circuit Courts of Appeals in 75 decisions since its publication.

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* The opinions expressed herein are those of the individuals listed below and are not intended to represent those of the Section of Antitrust Law or the American Bar Association.

Perhaps the clearest evidence of its influence is that it has been cited approvingly by no fewer than six majority opinions written by Justices commonly viewed as having widely varied judicial philosophies: by Justice Brennan in Cargill v. Monfort of Colorado, Inc., 107 S.Ct. 484, 495 n. 17 (1986); by Justice Powell in Matsushita Electrical Industries v. Zenith Radio Co., 106 S.Ct. 1348, 1357 (1986); by Justice Stevens in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S.Ct. 2847, 2858 and n. 29, 31, 2860-61 n. 39 (1985) and NCAA v. Board of Regents, 468 U.S. 85, 101 (1984); and by former Chief Justice Burger in Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978) and United States v. United States Gypsum Co., 438 U.S. 422, 442 (1978). Justice O'Connor also relied on The Antitrust Paradox in her concurring opinion in Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 36 (1984), as did Justice Blackmun in his dissent in National Society of Professional Engineers v. United States, 435 U.S. 679, 700 n.* (1978). It should also be noted that every member of the present Supreme Court joined one or another of these opinions.

In light of the fact that six of the nine present Justices have cited Judge Bork's book and that all of them have joined opinions citing it, Mr. McCarthy's claim that Judge Bork's antitrust views are "so far on the fringes of irrelevant extremism that [Bork] disqualifies himself from the debate" demonstrates more clearly than anything we could say that Mr. McCarthy does not know what he is talking about.

Mr. McCarthy is also quite wrong in his suggestion that Judge Bork's antitrust writings are anticonsumer. To the contrary, the central thesis of Judge Bork's book, as summarized in chapter 2, is that:

> (1) The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore,
> (2) "Competition", for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.
> R. Bork, The Antitrust Paradox 51 (1978).)

It is true that Judge Bork has also stressed that protection of consumer welfare is sometimes inconsistent with protection of some businesses from legitimate competition. The key point, here, however, is that Judge Bork advocates pro-competitive policies which promote the very efficiency that makes the enhancement of consumer welfare possible.

Thus, we fear that it is Mr. McCarthy, and not Judge Bork, who is out of touch with the center of legitimate judicial and economic thought about the proper direction of antitrust analysis. Fortunately, the mainstream view, which no one has helped promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare rather than unnecessary government intervention to protect politically favored competitors.

Sincerely,

James T Halverson

James T. Halverson
Shearman & Sterling
New York, New York
Immediate Past Chairman
Section of Antitrust Law
American Bar Association

On behalf of himself and:

Richard A. Whiting
Steptoe & Johnson
Washington, D.C.
Section Chairman, 1984-85

Richard W. Pogue
Jones, Day, Reavis & Pogue
Cleveland, Ohio
Section Chairman, 1983-84

Carla A. Hills
Weil, Gotshal & Manges
Washington, D.C.
Section Chairman, 1982-83

E. William Barnett
Baker & Botts
Houston, Texas
Section Chairman, 1981-82

Harvey M. Applebaum
Covington & Burling
Washington, D.C.
Section Chairman, 1980-81

Earl E. Pollack
Sonnenschein, Carlin,
Nath & Rosenthal
Chicago, Illinois
Section Chairman, 1979-80

Allen C. Holmes
Cleveland, Ohio
Section Chairman, 1978-79

Ira M. Millstein
Weil, Gotshal & Manges
New York, New York
Section Chairman, 1977-78

Edwin S. Rockefeller
Schiff Hardin & Waite
Washington, D.C.
Section Chairman, 1976-77

John Izard
King & Spaulding
Atlanta, Georgia
Section Chairman, 1974-75

Julian O. von Kalinowski
Gibson, Dunn & Crutcher
Los Angeles, California
Section Chairman, 1972-73

Richard K. Decker
Of Counsel
Lord, Bissel & Brook
Chicago, Illinois
Section Chairman, 1971-72

Frederick M. Rowe
Kirkland & Ellis
Washington, D.C.
Section Chairman, 1969-70

Miles W. Kirkpatrick
Morgan, Lewis & Bockius
Washington, D.C.
Section Chairman, 1968-69

APPENDIX E

Statement of

PHILIP A. LACOVARA

FORMERLY COUNSEL TO THE WATERGATE SPECIAL PROSECUTOR

Submitted to the

Senate Committee on the Judiciary

in Connection with the

NOMINATION OF ROBERT H. BORK,

To be Associate Justice of the Supreme Court

During the hearings on the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court, a number of questions have arisen about his role in the so-called "Saturday Night Massacre" and the events immediately following it. Since I was a personal participant in many of the events about which Judge Bork has been examined, I want to make certain that the record accurately reflects what occurred, as I have already reported to the Staff of the Judiciary Committee. In sum, the substance of Judge Bork's testimony, as I understand it, accurately reflects the tone and direction of his statements to the senior staff of the Watergate Special Prosecution Force in the hours and days after his dismissal of Special Prosecutor Archibald Cox.

I

From early July 1973 until the end of September 1974, I served as Counsel to the Special Prosecutor, Watergate Special Prosecution Force. In that role, I was the lawyer primarily responsible for advising Special Prosecutor Archibald Cox and then his replacement, Leon Jaworski, on legal and policy matters. I was also in charge of litigation of these issues. In particular, I was responsible for advising the Special Prosecutors on questions of executive privilege, including particularly subpoenas for production of White House tapes. Deputy Special Prosecutor Henry S. Ruth and I were the two senior members of the large staff that Mr. Cox had assembled as part of the Watergate Special Prosecution Force.

II

As I understand it, one of the main questions raised about the testimony Judge Bork has given both during his 1982 confirmation hearings for his seat on the Court of Appeals and during his current hearings is whether his recollection of his conduct immediately after the dismissal of Mr. Cox on Saturday, October 20, 1973, represents "revisionist history" and whether he was only willing to cooperate with the Watergate investigations after he detected the so-called "fire storm" that developed in the days following the dismissal of Mr. Cox. I was there, and it is unfair and inaccurate to insinuate that Judge Bork has shaded his testimony.

III

At the outset, I want to state, as I have in print before, that I thought at the time and continue to think now that Judge Bork made the "wrong" decision when he decided to comply with President Nixon's instruction to dismiss Mr. Cox, rather than to follow the path chosen by Attorney General Richardson and Deputy Attorney General Ruckelshaus. Nevertheless, from the first conversation that I had with Mr. Bork on the evening of the Saturday Night Massacre and from subsequent conversations, I have been satisfied that he acted for what were reasoned and reasonable motives and that his conduct was in all respects honorable.

IV

After the early evening announcement on Saturday, October 20, of the dismissal of Mr. Cox, most of the members of the staff of the Watergate Special Prosecutor's office gathered at the headquarters of the prosecution team to consider whether the dismissal would undermine or abort the many ongoing investigations under our jurisdiction. At 9:50 p.m. that night, I telephoned Mr. Bork at his home to discuss that issue, and specifically to learn whether he had intended to discharge the Assistant Special Prosecutor who had actually been conducting the investigations.

It would be hard to overstate the importance of that question. In the five months since his appointment as Special Prosecutor, Mr. Cox had assembled a staff of approximately 35 Assistant Special Prosecutors who had already commenced a number of grand jury proceedings into the Watergate break-in and cover-up and into a variety of other highly sensitive matters assigned to the Watergate Special Prosecution Force. Mr. Cox had carefully recruited his staff to assure that they would be completely independent of any governmental or political relationship that would call into question their objectivity and independence. Each of the staff prosecutors was specially appointed for this assignment. If Mr. Bork as Acting Attorney General had not only dismissed Mr. Cox, but

also dissolved the staff and terminated the special appointments, there would have been substantial and perhaps irreparable obstruction of the ongoing criminal investigations.

During my conversation with Mr. Bork within a few hours of the announcement of Mr. Cox's dismissal, however, he assured me that he had not endeavored to do anything beyond follow the narrowest interpretation of the President's instruction, which was to dismiss Mr. Cox. Although I expressed to him in the strongest possible terms my objection to that decision, he provided to me the same explanation that he has provided on many occasions since then: that in his discussions with Attorney General Richardson about the options, he had concluded, and that Mr. Richardson had concurred, that the personal pledge of tenure that the Attorney General had given when he selected Professor Cox did not apply to other officials of the Department of Justice; that in Mr. Bork's view the President had the lawful constitutional power to order the dismissal of any employee of the executive branch in a position such as Mr. Cox's; and that, most important, his decision to take the course that he initially favored--to resign rather than to execute the President's directive--would have established a pattern causing the resignation of all policy level officials of the Justice Department, thus leaving thousands of ongoing civil and criminal matters without policy level direction.

Mr. Bork assured me that his compliance with the nstruction to discharge Mr. Cox had no effect on the authority r tenure of the several dozen prosecutors who had been onducting the investigations under Mr. Cox's jurisdiction. I romptly reported that assurance to the staff.

V

From 6 p.m. until 8:15 p.m. on Monday, October 22nd, eputy Special Prosecutor Ruth and I met with Acting Attorney eneral Bork and the head of the Criminal Division, Henry etersen, to discuss the continued pursuit of the nvestigations. Although that meeting was quite eated--largely because of exchanges between Mr. Petersen and e--my distinct recollection of the tone of the meeting was hat Mr. Bork was sincerely dismayed that I might perceive his ction as an effort to interfere with the administration of ustice. He repeated to Mr. Ruth and me the same explanation hat he had given me on Saturday night for his reluctant ecision to obey the President's direction. He said that he ad been confident that, at some point after the entire policy evel of the Department of Justice had been wiped out in a attern of resignations, some senior civil servant next in line o become "Acting Attorney General" would have obeyed the esident's instruction and ordered Cox's dismissal. Since the esult was, in Mr. Bork's view, inevitable, since he considered he order--however unwise--to be within the President's

constitutional power, and since he regarded mass resignations at the Department of Justice as a greater obstacle to the administration of justice, he explained that he had decided to implement the directive.

At that meeting he repeated the assurance that he had given within hours of dismissing Mr. Cox that he hoped that the staff that Mr. Cox had assembled was to remain on duty. Although the Watergate Special Prosecution Force would formally become part of the Criminal Division, subject to general oversight by Assistant Attorney General Petersen, a career Justice Department prosecutor, whose integrity had never been at issue, both Acting Attorney General Bork and Mr. Petersen repeatedly insisted that they expected a full and thorough investigation of all the matters under our jurisdiction. Both men made it clear that they would not be parties to any effort to impede these investigations or to cover up any criminal involvement by any White House officials.

One of my most vivid recollections of that evening is that it was plain that, because of his peripheral role as Solicitor General, Mr. Bork had not been familiar with the depth and scope of the sensitive investigations assigned to the Watergate Special Prosecutor beyond those that have come to be known as the "Watergate" investigations. Some of those investigations involved not only allegations against senior White House officials, including the President, but also

allegations about then-present or former officers of the Department of Justice itself. When I explained that it was the existence and delicacy of those investigations that underscored the need for a Special Prosecutor, Mr. Bork appeared to recognize that the affair had dimensions that he had not previously appreciated.

Despite some suggestions by others to the contrary, Mr. Bork reiterated that night his commitment to full and vigorous investigations as long as he remained Acting Attorney General. I specifically recall the assurances that he and Assistant Attorney General Petersen gave that the investigations would proceed on an objective, thorough and professional basis and would seek whatever evidence was relevant in determining guilt or innocence of the persons under investigation.

None of the four men meeting in the Solicitor General's office that evening knew precisely what would happen next, and both Mr. Bork and Mr. Petersen urged Henry Ruth and me to do whatever we could to keep the staff together and to remain at our posts as well. We left for later discussion the determination of precisely what investigative methods to use in pursuing the investigations.

Later that night and then again the following morning, Tuesday, October 23rd, Henry Ruth and I met with the rest of the staff to convey to them the assurances that we had received

from Acting Attorney General Bork and Mr. Petersen that they wanted the investigations to continue vigorously and that they would protect the integrity of those investigations. As a result of those assurances, Mr. Ruth and I, and the remainder of the staff, resolved that we would continue to conduct the kind of independent investigations that Professor Cox had hired us to pursue, unless and until either Mr. Bork or Mr. Petersen took action inconsistent with those assurances.

VI

There was no such contrary action from either man. Later that morning, Tuesday, October 23--the first business day after the "Saturday Night Massacre" and the first day possible for court proceedings--I spoke with Acting Attorney General Bork to tell him that the staff would remain on duty. I also informed him that it was our intention to take an action that would necessarily be regarded as a direct attack on the instructions that General Alexander Haig, President Nixon's White House Chief of Staff, had given as part of the "Saturday Night Massacre": the instructions to the Federal Bureau of Investigation and then subsequently to the United States Marshal's Service to take custody of the investigative files that the Watergate Special Prosecution Force had developed. The action that we were planning to take, I informed Mr. Bork, was to ask Chief Judge John Sirica, in his capacity as the judge supervising the federal grand juries, to issue a

protective order placing all of the investigations files under the custody of the lawyers in the Watergate Special Prosecution Force as "agents" of the grand jury, and enjoining any other officials of the government from interfering with our custody and use of those materials. That action was intended to override directly any assertion of White House power to assume control of our sensitive investigative files.

Despite the obviously sensitive nature of that plan, Acting Attorney General Bork assured me that he concurred with it and was prepared to "stipulate" to the entry of the order, although he expressed concern that no one should infer from it that either he or Mr. Petersen would otherwise be "looting" the files. Mr. Bork gave me this assurance before the President's lawyer, Charles Alan Wright, later announced that the President was going to comply with the subpoena for White House tapes.

As further evidence of the reliability of the assurances that both Mr. Bork and Mr. Petersen had given us about their support for the integrity and independence of investigations of high level misconduct, free from White House interference, Assistant Attorney General Petersen personally joined the petition that I had informed Mr. Bork we would be filing to obtain a protective order prohibiting anyone from removing any grand jury records from the office of the staff of the Watergate Special Prosecution Force.

In addition, there was a question about who should represent the Government in the proceedings that Chief Judge Sirica scheduled for the afternoon of Tuesday, October 23, to ascertain whether the President would comply with the order of the Court of Appeals requiring production of the White House tapes. After we gave Mr. Petersen general briefings on the scope of the investigations that we were conducting, and specifically on the positions that the Watergate Special Prosecution staff was planning to take in further court proceedings over the subpoenaed tapes, Acting Attorney General Bork expressly agreed that the lawyers whom Archibald Cox had selected should continue to handle all court proceedings relating to matters under our jurisdiction.

Indeed, to the best of my recollection, Mr. Bork and Mr. Petersen approved every recommendation that we made between the "Saturday Night Massacre" and the appointment of Leon Jaworski as the new Special Prosecutor.

VII

It is, therefore, unfair and inaccurate to suggest that Mr. Bork's recollection of the events surrounding the "Saturday Night Massacre" and his posture in those events has been skewed either by the "fire storm" that began building during the following week or by the desire to win confirmation of his nomination to the Supreme Court. My recollection of the

events in which I personally participated is substantially the same as his. I am very clear on this, because, as I mentioned earlier, I have always been of the view that Mr. Bork should have made a different judgment when he decided to obey the order to discharge Professor Cox, and I was quite alert to any indication that the judgment he did make reflected a desire to impede or undermine the integrity and vigor of the investigations that Mr. Cox was supervising.

Moreover, my impressions do not stand alone. In October 1975, the Watergate Special Prosecution Force published a 277 page official Report attempting "to describe accurately and completely the policies and operations of the Watergate Special Prosecution Force from May 29, 1973 to the middle of September 1975." (p.3) Of direct relevance to the matter before the Committee is the conclusion expressed on page 11 of that Report, which represents the contemporaneous assessment of the events by the prosecutors who were directly affected by them:

> "The 'Saturday Night Massacre' did not halt the work of WSPF, and the prosecutors resumed their grand jury sessions as scheduled the following Tuesday. Bork placed Assistant Attorney General Henry Petersen, head of the Criminal Division, in charge of the investigations WSPF had been conducting. Both men assured the staff that its work would continue with the cooperation of the Justice Department and without interference from the White House." (Emphasis added.)

VIII

Both this Committee and the Senate have before them a decision of enormous consequence for the Supreme Court and the country as well as for Judge Bork. In my judgment, it would be a terrible injustice to history as well as to Judge Bork to rely on a skeptical and inaccurate misunderstanding of his motives and actions during and after the "Saturday Nigh. Massacre," when members of the Committee and of the full Senate decide whether to advise and consent to the nomination.

I would be pleased to appear personally before the Committee to answer questions about these events. In any event, I respectfully request that this statement be included as part of the record of the hearings on the nomination.

I declare under penalties of perjury that the foregoing statement is true, to my best belief and recollection.

Washington, D. C.
September 22, 1987

APPENDIX F

FOR IMMEDIATE RELEASE October 20, 1973

Office of the White House Press Secretary

THE WHITE HOUSE

October 20, 1973

Dear Mr. Bork:

I have today accepted the resignations of Attorney General Richardson and Deputy Attorney General Ruckelshaus. In accordance with Title 28, Section 508(b) of the United States Code and of Title 28, Section 0.132(a) of the Code of Federal Regulations, it is now incumbent upon you to perform both the duties as Solicitor General, and duties of and act as Attorney General.

In his press conference today Special Prosecutor Archibald Cox made it apparent that he will not comply with the instruction I issued to him, through Attorney General Richardson, yesterday. Clearly the Government of the United States cannot function if employees of the Executive Branch are free to ignore in this fashion the instructions of the President. Accordingly, in your capacity of Acting Attorney General, I direct you to discharge Mr. Cox immediately and to take all steps necessary to return to the Department of Justice the functions now being performed by the Watergate Special Prosecution Force.

It is my expectation that the Department of Justice will continue with full vigor the investigations and prosecutions that had been entrusted to the Watergate Special Prosecution Force.

Sincerely,

RICHARD NIXON

Honorable Robert H. Bork
The Acting Attorney General
Justice Department
Washington, D. C.

90-839 0 - 89 - 38

APPENDIX G

Telegram to be sent by Professor Kauper to Senators Biden and Thurmond on September 30, 1987:

"During my testimony before your Committee on September 29, no questions were raised concerning the so-called Saturday Night Massacre. As Assistant Attorney General for the Antitrust Division, I was in regular communication with Acting Attorney General Bork in the days immediately following. Had the appropriate question been raised in my appearance before the Committee. I would have testified that either on Monday, October 22, or Tuesday, October 23, 1973, Judge Bork indicated to me that he had begun inquiries about who might serve as special prosecutor if needed, and that Leon Jaworski had been recommended to him."

APPENDIX H

THE WHITE HOUSE
WASHINGTON

October 24, 1973

MEMORANDUM FOR AL HAIG

FROM: LEN GARMENT

This is the product of this morning's discussion among Bork, Bryce, Fred and myself. It could be used as an opening statement by the President tomorrow. The principal substantive item is the proposal for an advisory committee.

cc: Fred Buzhardt
Ron Ziegler
Bryce Harlow

10/24/73

I frankly recognize that we have reached a crisis of confidence that words alone cannot dispel. There are deep suspicions in the country concerning the conduct of the American government with respect to the conduct of the investigations into Watergate and related matters that only resolute action can quiet. I believe those suspicions to be unfounded and to rest upon a misunderstanding of what we have proposed and what we have done. But I also know that I must do far more than explain the reasonableness of the compromise I proposed last week or the reasons why I could not accept flat defiance of my orders by a member of the Executive Branch.

Instead, I appear before you tonight to answer questions about the actions I have taken and the actions I am now taking in order once and for all to dispel suspicions and make it possible to get on with pressing national business.

You all know the action that I have taken. On Tuesday I ordered my attorneys to appear in court and announce full compliance with Judge Sirica's order as modified by the Court of Appeals. In doing that I gave way on a deeply held principle of Presidential confidentiality and I must hope that I have not done irreparable damage to the office and to the necessary confidentiality that all Presidents of the United States have needed and that all future Presidents will need if they are to govern effectively.

But there is a consideration greater even than the crucial principle of confidentiality and that is the continued effectiveness and credibility of the government of the United States, both at home and abroad. That is always of paramount importance and in these times of international crisis with the ever-present possibility of major-power confrontation, the effectiveness and credibility of the American government is indispensable to survival.

That is why I ordered full disclosure to the court of the material it sought. The court will now decide what material the grand jury needs in order to proceed with its decisions concerning the appropriateness of indictments.

But I also recognize that that step is not enough. What is necessary is to reassure the American people that the processes of American justice remain intact and with their integrity unimpaired. I know that it does and that the Department of Justice will proceed rapidly and even-handedly to investigate and, where called for, to prosecute all the matters formerly handled by the Special Prosecutor. But my confidence alone is not sufficient. The American people must see that justice is being done. Toward that end I propose two steps.

First, I am directing the Department of Justice to appoint as a special prosecutor a man of unimpeachable integrity and of experience in the field of criminal investigation and prosecution. He must be a man whose reputation and, even more, whose actions will show Americans of all political views that these prosecutions are free of partisan zeal and political considerations of any nature whatsoever.

Second, in order that that special prosecutor may have the counsel and, to be perfectly candid about it, the protection he needs from political attack, I will appoint a special advisory committee of lawyers with national reputations to oversee the investigations and prosecutions. I will, furthermore, ask the American Bar Association, to approve the names I submit for membership on this committee before they are appointed.

This committee will have complete access to the materials developed by the investigations and will have the power to order that indictments be brought or that they not be brought. It will, moreover, have the power to require that evidence be sought or that it not be sought. Probably, there will be very few cases of conflict between a responsible and experienced prosecutor and an equally responsible and experienced committee, but it is vital to the American public's perception of the course of justice that the committee be there to counsel and, if the case should ever arise, to control.

These measures are extraordinary, but extraordinary measures are required, and I am fully prepared to take them.

APPENDIX I

Nixon and Bork Reported Split on Prosecutor's Role

Difference Over Access To Documents Could Delay Appointment

By JOHN M. CREWDSON
Special to The New York Times

WASHINGTON, Oct. 28—An apparent conflict between President Nixon and his Acting Attorney General, Robert H. Bork, over the independence of a new special Watergate prosecutor could delay the naming of a replacement for Archibald Cox unless it is resolved in the next day or two.

President Nixon announced at a news conference Friday night that Mr. Bork would appoint a new prosecutor early this week, but he added that the White House had no intention of providing him with "Presidential documents" such as those Mr. Cox had requested.

Mr. Bork, on the other hand, has let it be known that he believes strongly that whoever takes the job from which Mr. Cox was dismissed a week ago "ought not to have any strings on him from anybody."

Cox Asks Guarantees

Mr. Cox maintained in a television interview today that it was "essential" that his replacement have statutory guarantees of freedom and independence from the President.

"Have I communicated to the While House my feeling that the special prosecutor ought to be free? The answer is yes," he said, adding that no "reputable man with a reputation to maintain" would accept the post without such assurances.

Possibility of Quitting

In the interview, Mr. Bork also raised the possibility that he might resign from the Justice Department "if a special prosecutor were set up and his independence were interfered with."

"My position is untenable unless these investigations and prosecutions are handled correctly," he said.

Elliot L. Richardson chose to resign as Attorney General a week ago rather than dismiss Mr. Cox for his refusal to obey an order by Mr. Nixon not to pursue in the courts his quest for the nine White House tapes.

To do so, Mr. Richardson said, would have violated his pledge to the Senate when he was confirmed as Attorney General last May that the special prosecutor would have full authority to challenge in court claims of executive privilege by the President.

William D. Ruckelshaus, Mr. Richardson's former deputy, was discharged by the President a short time later for also refusing to dismiss Mr. Cox.

Mr. Bork, who as Solicitor General was next in command, agreed to carry out the order. He has said he had planned to resign immediately afterward but was persuaded by Mr. Richardson to stay on "because the department needed continuity."

Morale Problem

If the conflict between the Acting Attorney General and the White House over the special prosecutor's role eventually lead to Mr. Bork's resignation, the effect on a Justice Department shaken by the loss of its top officials would do still further damage to morale and efficiency.

Mr. Bork was reportedly consulting with top White House aides over the weekend on possible nominees for special prosecutor and on the guarantees to b provided to him in seeking Presidential materials, but it could not be learned whether any resolution had been reached.

Mr. Bork also expressed the hope that he "would be able to prevent" the appointment of a person who he did not believe was suited for the job, and he implied that he would resign if he were overruled.

"These prosecutions have to

be carried on correctly, and if I thought they were not going to be because of the person chosen, I couldn't tolerate that," he said before the President's announcement at his news conference last Friday night.

He also said he had suggested "five or six names" to the White House who met his prerequisites for the job — previous experience as a prosecutor, something Mr. Cox did not have, and someone who is not now withing the Government.

Not Petersen

Mr. Bork declined to name his choices, but they reportedly do not include Mr. Richardson, Mr. Ruckelshaus or Henry E. Petersen, the Assistant Attorney General who has temporarily taken control of the department's Watergate case. One or two, he said, are Democrats, and none of them is from Yale.

General Haig, the White House chief of staff and one of the officials with whom Mr. Bork is believed to be consulting over the appointment, said today that he did not believe a new prosecutor "will have to make a pledge of any kind" not to seek additional White House tapes or other confidential documents.

"Nor do I think he should," General Haig continued, "and if he were the type that would feel encumbered in that way, he's perhaps not the man that we would want."

Mr. Nixon agreed last Monday to surrender the nine original recordings of conversations between him and his aides to the United States District Court here. His decision came two days after Mr. Cox was discharged for refusing to acquiesce in the President's order barring him from seeking the tapes through the courts.

The former special prosecutor and Harvard law professor conceded today that his subpoena for the nine recordings had been "only the first step in seeking a great deal of important evidence from the White House."

Would Have Checked Gifts

Had he remained in office, Mr. Cox said, he would have also challenged the President's assertion of executive privilege in refusing to release certain information concerning campaign contributions from big dairy industry cooperatives that critics have linked to a 1971 increase in milk-price supports.

Mr. Cox emphasized, on the National Broadcasting Company's "Meet the Press" television program, that he had no hard evidence that the White House was concerned about some of the aspects of his investigation.

"But," he added, "I gathered the impression from the Attorney General that he was occasionally subject to calls" from the White House over the scope of the Cox inquiry.

In its issue on sale tomorrow, Time magazine reports that Mr. Cox was dismissed after the White House challenged his determination to pursue four sensitive avenues of investigation, including a program of "national security" wiretaps on Government officials and newsmen.

The three other areas objected to, according to the report, involved a 1970 operation that raised $4-million for Congressional and gubernatorial candidates, the handling of anti-Nixon demonstrators during the 1972 Presidential campaign, and the activities of the White House's special investigations unit known as the "plumbers."

Predicts Approval

Senator Birch Bayh, Democrat of Indiana, appearing on the American Broadcasting Company's "Issues and Answers" program, predicted that Congress would approve a resolution introduced last week that would authorize the appointment of a special Watergate prosecutor by the courts.

The measure, which has gained 53 co-sponsors in the Senate, was endorsed yesterday by the American Bar Association in a resolution, passed by

the organization's board of governors, calling on Congress to create an independent "office of special prosecutor."

General Haig said today that although the Nixon Administration welcomed the views of the Bar Association, "no President can run this great republic by being the victim of a viewpoint of a particular advocate of a particular point of view."

"I don't think President Nixon is going to feel encumbered by that recommendation," General Haig said on the Columbia Broadcasting System program "Face the Nation." But he added, "He might not ignore it, either."

Mr. Cox, who as prosecutor had no statutory authority, said today that he would prefer that an independent prosecutor, authorized by Congress, be appointed by the courts rather than the President, even though in either case his autonomy would be guaranteed by law.

Feels Less Certain

However, he conceded that he was less certain about the constitutionality of a Congressionally authorized prosecutor who was appointed by the court.

"I feel no hesitance in saying that a bill that created an independent prosecutor, truly independent, and gave him enough power to do the job in a broad enough area, would be constitutional if it allowed for appointment with the advice and consent of the Senate," Mr. Cox said.

On Friday, Mr. Bork expressed strong reservations about the effort in Congress to set up a prosecutor ultimately answerable to anyone except the Presideent, on the ground that criminal prosecution ought to be a function of the executive branch.

"You don't want to set in motion a train of events in which we wind up with every branch of government with its own Department of Justice, and we conduct relations between the three branches of government by litigation," he said.

Asked what he might do if Congress proved to be successful in its efforts to establish an independent prosecutor, he replied that "some day I would write a stinging article in The Yale Law Journal about the inadvisability of that course of action."

But Mr. Cox suggested that there would be no real problem if Mr. Nixon and Congress both moved to appoint their own special Watergate prosecutors.

"I think Congress could easily legislate the Presidential appointed one out of existence, that would surely be constitutional," he said.

Asked whether he might succumb to sentiment in Congress to take back his old job if it were re-established by law, Mr. Cox, who was packing today to leave for an extended vacation in Maine, conceded that "I suppose if I were pressed that I would have to consider it."

But he added, "It would be unwise for anyone to offer it to me, and unwise for me to take it."

Nixon Plan on Prosecutor Is Opposed by Mansfield

Senator Wants Watergate Aide Named by Courts—Ford Believes President Regrets His Attack on News Media

Special to The New York Times

WASHINGTON, Oct. 27 — President Nixon's position that the new special Watergate prosecutor will be named by the Administration rather than the courts drew continued opposition today from Democrats in Congress.

"No soap" was the comment that Senator Mike Mansfield, the Senate majority leader, made about the President's announcement last night at his news conference.

In another development stemming from the news conference, Representative Gerald R. Ford, the Vice President-designate, said that he believed that Mr. Nixon, "on second thought, probably wished he hadn't" made such a vigorous attack on the news media. The President had characterized some recent news reports as "outrageous, vicious, distorted." [Details on Page 47.]

And in Chicago, the American Bar Association declared that it could not accept an appointment of a prosecutor by Mr. Nixon and called on Congress to create an independent "Office of Special Prosecutor."

The continuing controversy over the successor to Archibald Cox as special prosecutor came as public opinion polls reported that Mr. Nixon's popularity rating had fallen below 30 per cent for the first time.

Mr. Nixon said last night that Acting Attorney General Robert H. Bork would name a new prosecutor next week, and that the appointee would have independence and the Administration's cooperation.

Mr. Mansfield, a Montana Democrat, said, however, that he would support a bill that calls for a court-appointed special prosecutor to guarantee the prosecutor's independence. The bill has 53 co-sponsors, Democrats and Republicans.

Senator Mansfield said, "It has to be a special prosecutor who had the same kind of authority that Archibald Cox had."

Representative Thomas P. O'Neill, the House Democratic leader, said in a statement that he did not believe that the new prosecutor "will be acceptable to the Congress and the American public under the terms the President outlined."

After six days of national turmoil that followed the dismissal of Mr. Cox, Mr. Nixon agreed last night to appoint a special prosecutor through the Justice Department.

Independence was clearly the key issue. Attorney General Elliot L. Richardson resigned and his deputy, William D. Ruckelshaus, was dismissed because the independence of Mr. Cox to pursue the Watergate inquiry wherever it led had been curtailed by the President.

Mr. Cox had sought to obtain Presidential tape recordings and documents that the White House refused to yield, asserting that they were confidential. Mr. Cox went to court. The President lost in United States District Court and in the Court of Appeals. He then tried to force a compromise on Mr. Cox. When Mr. Cox refused to accept it, Mr. Nixon dismissed him.

The Acting Attorney General, Mr. Bork, has indicated that he, too, will resign if the new special prosecutor is not given

independence of action.

The adverse reaction of Mr. Mansfield and Mr. O'Neill followed similar comments by other Democrats immediately after Mr. Nixon's news conference. But some comments were favorable to the President.

Mr. Ford, the House minority leader whom Mr. Nixon has nominated for Vice President to replace the resigned Spiro T. Agnew, described the President's proposal for a new prosecutor as a fair compromise.

"My uderstanding is that responsible guidelines would be established for the prosecutor to keep him from irrelevant areas," Mr. Ford said in an interview.

He said that he felt the President was bending over backward to be cooperative, and that the special prosecutor proposed by the President would be "adequate for the present circumstances."

The data indicating further slippage in Mr. Nixon's popularity came from the latest Gallup Poll, taken Oct. 19-22. The Gallup organization said that the data had not yet been fully analyzed, but that so far they indicated an approval rating of 29 per cent for the President.

It said that the final figure could be as low as 28 per cent or as high as 30 per cent, which was Mr. Nixon's rating in the last previous national poll, taken Oct. 5-8.

1,500 People Questioned

In the latest poll, about 1,500 people were asked the following question in personal interviews: "Do you approve or disapprove of the way Nixon is handling his job as President?" The polling was done in the period in which Mr. Nixon dismissed Mr. Cox and Mr. Richardson resigned but before the President announced his decision to turn the tapes over to the Federal court.

As recently as mid-June, Mr. Nixon had an approval rating of 45 per cent, with 45 per cent voicing disapproval and 10 per cent having no opinion.

Those questioned in the poll were also asked: "Do you think President Nixon should be impeached and compelled to leave the Presidency or not?" Thirty-one per cent answered yes, 55 per cent no and 14 per cent had no opinion.

A poll on the same point in Aug. 3-6 showed 28 per cent for impeachment and 61 per cent against. One in June 22-25 showed 19 per cent for impeachment and 69 per cent opposed.

Senate Democrats Ask Independent Special Prosecutor

By Lawrence Meyer
and Martin Weil
Washington Post Staff Writers

The Senate Democratic caucus overwhelmingly approved a resolution last night calling for an independent special prosecutor to continue the investigation and prosecution "of criminal actions arising out of the Watergate affair and all of its related activities."

The resolution, sponsored by Sen. Sam J. Ervin Jr. (D-N.C.), chairman of the Senate select Watergate Committee, was approved following a 2½-hour meeting in which a wide variety of proposals for continuing the Watergate investigation were reportedly discussed.

The Democratic caucus' vote came on the eve of the resumption of the Watergate committee's hearings. The committee will open its investigation into campaign financing with testimony from Berl Bernhard, 1972 presidential campaign manager for Sen. Edmund Muskie (D-Maine).

Ervin's resolution was approved after Senate Majority Leader Mike Mansfield (D-Mont.) had opened the discussion by bringing up the future of Ervin's committee in conjunction with President Nixon's action on Oct. 20 ordering the dismissal of Special Watergate Prosecutor Archibald Cox.

"Now," Mansfield said in a statement he released and read to the caucus, "it is no longer possible, in my judgment, to contemplate the shutdown of the Ervin committee. On the contrary, I would hope and expect that the Senate would consider forthwith the extension of the committee, with a mandate enlarged to include all the matters which were under consideration by the special prosecutor's office in the Justice Department at the time of the summary dismissal of Mr. Archibald Cox."

President Nixon announced late Friday night that acting Attorney General Robert H. Bork would appoint a new special prosecutor who will have "independence" this week.

Mr. Nixon also said, however, that the new special prosecutor would not have access to presidential documents—the issue that ultimately precipitated the firing of Cox. Bork reportedly has insisted that whoever he appoints must have access to whatever evidence he needs to investigate and prosecute in the Watergate affair and other matters coming under his jurisdiction and that no procedural restraints should be placed on his actions by the White House.

Mansfield, who received a standing ovation after he spoke, told the caucus that the Ervin committee is presently the only "duly-constituted and equipped (body) to continue an independent, impartial inquiry into the Watergate affair. That will remain the case unless and until there is at least designated a new special prosecutor whose powers are as broad and whose integrity

are as great as that which surrounded Archibald Cox."

Mansfield also endorsed legislation introduced by Sen. Birch Bayh (D-Ind.) and sponsored by a majority of the Senate calling for the creation of a special prosecutor by act of Congress, with the prosecutor to be appointed by the courts.

The effect of the Ervin resolution, which directs Mansfield to consult with minority leader Hugh Scott (R-Pa.) "with a view to the creation of the office of an independent prosecutor," is to endorse the concept of Bayh's legislation without taking up—for the moment at least—the question of extending the life and expanding the jurisdiction of the Ervin committee, which is now required to file a report and end its business by February 1974.

Mansfield, who was the prime force behind the creation of the Ervin committee, told a reporter that he favored giving the committee a new, long-term mandate "if we don't get the right kind of a special prosecutor."

Mansfield was described by one knowledgeable Senate source as being "fully in accord" with the resolution that the caucus passed. This source said the resolution, coupled with Mansfield's statement, could be read as a message to President Nixon that he should modify his position on the powers of the special prosecutor. "The problem's not going to go away. I think that's the signal," this source said.

A senator present at the caucus disagreed, however, that the caucus action carried any implied threat to President Nixon but rather was aimed at lining up support for a move to override a veto of a special prosecutor bill passed by Congress if Mr. Nixon does not go along and sign it. This senator said that Mansfield's suggestion that the Ervin committee be given more time and more authority was not discussed.

Ervin, who was understood to be opposed to extending the life of his committee, said after the caucus that the Senate still had four months to act on extending and expanding the probe if the need arises.

According to reliable sources Mansfield did not tell Ervin about his proposal prior to presenting it to the caucus. The resolution that Ervin finally presented for a vote—the only resolution put up to the caucus on the subject—"just sort of evolved" after 2½ hours of discussion, according to one source. The Ervin resolution was accepted with only a few voices heard voting against it, according to one senator.

During a morning executive session of the committee, the committee authorized Ervin to introduce a bill that would clearly give the United States District Court here jurisdiction to hear a suit by any congressional committee to enforce a subpoena it had issued to anyone, including the President.

The legislation is designed to overcome a ruling by Chief United States District Judge John J. Sirica in the suit brought by the committee seeking to enforce its subpoena of five White House tape recordings relating to the Watergate fair.

Sirica dismissed the suit earlier this month, ruling that he had no jurisdiction over it. Ervin said he hoped that the bill could be passed by the Senate "within 48 hours" without referring it to committee and that the House of Representatives would approve the measure promptly in order to expedite the committee's suit, which is now before the United States Court of Appeals.

Sen. Howard H. Baker (R-Tenn.) vice-chairman of the committee, that the power of a committee to issue a subpoena is an "idle power" if the committee cannot enforce its subpoena in court.

Besides dealing with the issue of the tapes, the legis-

lation also is understood to be adequate to resolve the difficulty the committee is having obtaining President Nixon's bank records from the Key Biscayne bank of Charles G. (Bebe) Rebozo, Mr. Nixon's close friend. Rebozo hasn't responded to a subpoena from the committee for the records.

The committee will resume its hearings today with the testimony of Bernhard, former Muskie campaign manager. Bernhard will be followed by Clark MacGregor, former director of the Committee for the Re-election of the President.

Bernhard and MacGregor were described yesterday as "transition witnesses" who will help move the committee from the second phase of its hearings, concerned with so-called campaign "dirty tricks," into the third and final scheduled phase of campaign financing.

The committee announced that it had applied for limited immunity from prosecution for three prospective witnesses — Robert Lilly, Robert Isham and John Meier.

Lilly and Isham are officials of the Associated Milk Producers Inc., a diary farmers' cooperative that gave more than $200,000 to President Nixon's re-election campaign prior to the implementation of an increase in government price supports for milk. Meier is a former employe of billionaire recluse Howard Hughes, whose contributions in 1969 and 1970 of $100,000 to Mr. Nixon through Rebozo are being investigated by the committee.

Following a morning executive session of the committee, Ervin and Baker discussed with reporters the meeting that they had had with President Nixon at the White House on Oct. 19 when he proposed his arrangement to turn over partial transcripts of the tapes to the committee.

Although their remarks were set in a conciliatory context with both senators expressing hope that the offer from Mr. Nixon would be reinstated, Ervin and Baker both stressed that they had made no agreement to accept the offer on behalf of the committee. "It was a proposal, not a compromise or an agreement," Ervin told reporters.

Ervin said he and Baker told Mr. Nixon that they would recommend to the committee that it accept the offer but that they made it clear that they have no authority to accept the offer for the committee.

Both senators recalled again that they had been called hurriedly to the White House from out-of-town speaking engagements —Ervin in New Orleans and Baker in Chicago—and that they had had no opportunity to consult with their staffs before the meeting.

Although Baker said in response to a question that "I do not feel that we were used by the White House," both senators made it clear that when they met with Mr. Nixon they were not told that a similar offer had been made to Cox and that he had not accepted it.

From a political point of view, that knowledge could have been significant since Mr. Nixon asserted at his press conference last Friday night that "Mr. Cox was the only one" who rejected the proposal.

Ervin said yesterday that "We took the position that we had nothing to do with Mr. Cox's investigation," and that during the White House meeting "we were told that they would contact Mr. Cox to work out a suitable agreement . . . We were never asked to approve any agreement to which Mr. Cox was a party," Ervin said.

Asked if he thought Cox had been correct in refusing to accept less than total access to the tapes and other documents that he was seeking, Ervin responded that the requirements of Cox's investigation and the committee's are different.

APPENDIX J

Statement of Henry E. Petersen
for Submission to the
Senate Committee on the Judiciary
September 22, 1987

My name is Henry E. Petersen. I served in the Criminal Division of the Department of Justice from 1951 to 1974, and as Assistant Attorney General in that Division from 1972 to 1974. I was a participant in certain of the events of late 1973 that have been discussed in connection with the nomination of Robert H. Bork to become Associate Justice of the U.S. Supreme Court. I submit this statement to the Senate Judiciary Committee in the hope that it will assist the Committee in gaining a fuller understanding of those events.

Upon being apprised of the resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus and the dismissal of Special Prosecutor Archibald Cox, I returned to Washington, D. C. on October 20, 1973, and was present at the Department of Justice the following day. At that time, then-Acting Attorney General Bork and I discussed our mutual conviction that the Watergate Special Prosecution Force's investigations must proceed without interruption or outside interference. As the Assistant Attorney General in charge of the Criminal Division, I was given oversight responsibility for the Watergate investigations

by the Acting Attorney General, who was acting pursuant to a presidential directive to return responsibility for the investigations to the Department of Justice. He and I well understood that our personal and professional reputations depended upon the proper conduct of those investigations. In our discussions on October 21, we noted the importance of keeping the Watergate Special Prosecution Force intact. This would necessarily require us to give the attorneys of the Special Prosecution Force our full support in their efforts to obtain relevant evidence.

On the evening of Monday, October 22, Acting Attorney General Bork and I met in the Solicitor General's Office with Deputy Special Prosecutor Henry Ruth and Special Prosecution Force Counsel Philip Lacovara to discuss the status and future of the Watergate investigations. The Acting Attorney General and I conveyed to Messrs. Ruth and Lacovara our desire that they remain in their positions and continue to conduct the investigations as they had previously. Mr. Bork and I assured them that they would have our full support as the investigations went forward and that we would permit no improper interference with those investigations so long as we remained in positions of responsibility. As Mr. Ruth, a person with whom I had enjoyed a professional relationship of trust and confidence, had been Special Prosecutor Cox's Deputy, we looked to him to provide leadership and continuity to the Special Prosecution Force.

On the following day, Acting Attorney General Bork and I met with members of the Special Prosecution Force at their offices and encouraged them similarly to continue their work on the investigations. I later met separately with the leaders of the various task forces assembled by Special Prosecutor Cox and received general reports on the status of their investigations. The task force leaders were asked to continue their work, and each agreed to do so.

The Watergate investigations proceeded under Mr. Ruth's leadership, with the support of Acting Attorney General Bork and me, and without interference from the White House, until the new Special Prosecutor, Leon Jaworski, assumed office on November 1, 1973. To my knowledge, no request or proposal by Mr. Ruth or any other person on behalf of the Watergate Special Prosecution Force was denied by the Acting Attorney General or by me during this period.

Acting Attorney General Bork's intention to see that the Watergate Special Prosecution Force's investigations continued with full support from the Department of Justice and without any impediment or interference was clear from my earliest contacts with him following the dismissal of Mr. Cox. To my knowledge, he acted at all times in a manner consistent with this intention.

I would be pleased to respond to any written questions that the Committee may wish to submit to me.

I declare that the foregoing is true and accurate to the best of my knowledge, information and belief.

Henry E. Petersen

Henry E. Petersen

APPENDIX K

AFFIDAVIT OF RALPH K. WINTER

Ralph K. Winter, first having been duly sworn, deposes nd says:

I am over eighteen years of age and believe in the bligation of an oath. I presently reside at 84 Maplevale rive, Woodbridge, Connecticut.

On Friday, October 19, 1973, I traveled with my wife and on to a motel in or near McLean, Virginia. I was scheduled o fly to western Virginia the next day to deliver a speech, hile my wife and son were going to spend the day with Mrs. ork. On the morning of October 20, Mr. Bork told my wife at he intended to go to work for a while and to come home lunchtime to watch a football game on television. My wife d son then went to the Washington Zoo with Mrs. Bork and e or more of the Bork children. When I returned in the te afternoon or early evening, I went to the Bork home in Lean. Mrs. Bork told me that there was a terrible crisis volving Mr. Bork. Messrs. Richardson and Ruckelshaus had signed rather than carry out a presidential order to scharge the Watergate special prosecutor, Archibald Cox. Bork had automatically become Acting Attorney General as result of the resignations and had agreed to carry out the der.

Sometime thereafter, Mr. Bork returned home. It was clear that he and his wife regarded his carrying out of the presidential order as an act that would inevitably have serious, if not disastrous, consequences for him. Mr. Bork told me that he had complied with the order because he felt, after conversations with Messrs. Richardson and Ruckelshaus, that if he did not carry out the order to discharge Cox, the Department of Justice would be left leaderless. He said that he, unlike Messrs. Richardson and Ruckelshaus, was not under a pledge to the Senate not to discharge the special prosecutor. He said that he did not believe that the President's order was unlawful because the discharge of the special prosecutor alone was not an obstruction of justice. He said that President Nixon had directed him to continue the Watergate investigations and that he, Nixon, wanted a "prosecution, not a persecution," or words to that effect.

Mr. Bork indicated to me that he intended to continue the Watergate investigation. My recollection is that during the evening a television commentator raised the question of whether the special prosecutor's staff would be dismantled and that Mr. Bork had indicated that that was out of the question. He said that in light of the staff's expertise in the matter, it seemed the only appropriate group to continue the investigation.

On the evening of October 21, 1973, there was a dinner party at the Bork house that had been planned some time before. Before dinner there was a conversation between Mr. Bork, Mr. William J. Baroody, Sr., and myself. Mr. Baroody asked Mr. Bork what he intended to do with regard to the Watergate investigation. Mr. Bork responded that he intended to continue the investigation through the Watergate special prosecutor's staff. Mr. Baroody indicated that he believed pursuit of the Presidential tapes was a partisan fishing expedition and said to Mr. Bork, "You don't have to go after the tapes," or words to that effect. Mr. Bork replied "I have to, if they are relevant to the criminal investigation," or words to that effect. My recollection is that Mr. Baroody then said something to the effect that the tapes might not be essential, and Mr. Bork indicated that that was a matter to be determined by those carrying out the investigation.

Dated at New Haven, Connecticut, this 25th day of September, 1987.

Ralph K. Winter

RALPH K. WINTER

Subscribed and sworn to, before me, this 25th day of September, 1987.

William H. Lacy

COMMISSIONER OF THE SUPERIOR COURT

APPENDIX L

James F. Gordon
Senior United States District Judge
422 Spring Road, Unit 5
Louisville, Kentucky 40207

August 24, 1987

The Honorable Joseph Biden
United States Senator
Senate Office Building
Washington, D.C. 20510

Re: Judge Robert Bork

Dear Senator Biden:

You may, after reading this communication, have no interest in pursuing the same further; however, I feel duty bound to communicate the facts set forth herein for your consideration.

Perhaps I should first make clear what this letter is not. It is not a complaint against the legal position taken by Judge Bork in the litigation hereinafter discussed, for he had the perfect right to take any position in the matter legally he wished. Nor is this letter a complaint arising from Judge Bork's well known conservative legal views, for even I am sometimes referred to in the local media as the "crusty old conservative."

Rather, it is a story of actions taken by Judge Bork which I believe reflect serious flaws in his character. So serious, in my judgment, that they go to his basic honesty.

This is the story. On several occasions between 1972 and 1983, I was designated, pursuant to 28 U.S.C. 294(d), to sit on the United States Court of Appeals for the District of Columbia in order to render assistance to them in a more speedy disposition of their appellate caseload. One such occasion was in the spring of 1982 when I was designated to sit with,

among others, Judges Roger Robb and Robert Bork, to hear, among other appeals, the important case of Guy Vander Jagt, et al. v. Thomas P. "Tip" O'Neill, Jr., et al., 699 F.2d 1166, cert. denied, 464 U.S. 823 (1983). Copy attached. I believe this was the first appeal Judge Bork heard after his appointment to the federal bench, for I recall that on the morning of March 19, 1982, I found him understandably lost in the hallway and directed him to the robing room of the Court.

After hearing the arguments in the Vander Jagt case, Judges Robb, Bork and I retired to the conference room to voice our individual beliefs as to what the Court's final holding should be. All three of us were in instant agreement that the relief be denied Appellants Vander Jagt. Judge Robb directed our attention to the fact that he had written the prior opinion of the D.C. Circuit in Riegle v. Federal Open Market Committee, 556 F.2d 873 (1981), which he, Judge Robb, considered to be the law of the Circuit. I agreed.

After discussion, it was agreed by all and ordered by Judge Robb that Judge Bork would write the unanimous opinion of the Court, denying relief to the Appellant Vander Jagt on the ground of "remedial discretion," relying on the Riegle case. We then turned our attention to the other appeals heard that morning, their decision and opinion writing assignments thereof.

As we were departing the room at the end of our conference, I recall Judge Bork alluding to the "lack of standing doctrine," to which both Robb and I, particularly Robb, took immediate vigorous exception and reiterated our views that the Riegle case controlled and was the opinion of the majority of the Court. There is no way Judge Bork could have misunderstood Robb's and my position.

Ten days later, I returned to Kentucky and heard nothing further from Judge Bork in the way of his proposed majority opinion in the Vander Jagt case. Months passed, and I began to become concerned lest the Court would not get its order released before the Congress adjourned December 31, 1982 when, though the issue would not become moot, it seemed to me it would be "undercut" in importance and result in somewhat unfair delay toward the Appellants Vander Jagt, who were basing the thrust of their case on the facts existing in the House of Representatives as it was constituted in that session.

Though I was concerned, I took no steps of inquiry, as that was Judge Robb's responsibility as the presiding Judge of our panel. I did not then know that Robb had taken senior status May 31, 1982, and Bork had become the ranking Judge of our panel.

Finally, around the first part of November, 1982, I received a proposed majority opinion from Judge Bork, denying relief to the Appellants on the narrow ground of "no standing." There was no note or cover letter, just the bare bones opinion. I was shocked, to say the least, at the tenor of the opinion; however, my first thought was that perhaps Judge Bork had, since my departure for Kentucky, changed Judge Robb's opinion as to the doctrine of "no standing."

Of course, Judge Bork was freely entitled to his individual judicial opinion as to "no standing" but he was not entitled to make it my opinion or Robb's opinion without our individual consents.

Recognizing that if, in fact, Bork had changed Robb's thinking, I would be required, in truth to my own beliefs, to write a sole concurring opinion denying relief to Appellants Vander Jagt on the ground of "remedial discretion," I concluded to telephone Judge Robb to ascertain the true situation. When I

did so, I discovered Judge Robb to be hospitalized with what I was advised was a serious cancer condition and that he was unavailable for a telephone conversation with me. I then learned, for the first time, that Judge Robb had taken senior status. Immediately, I instructed my law clerk to contact Judge Robb's senior law clerk and instruct him or her in my name to visit Judge Robb if possible, and acquaint Judge Robb generally with Judge Bork's submitted proposed majority opinion and ascertain his (Robb's) reaction thereto.

Several days later I received a call from another Judge of the D.C. Circuit Court of Appeals advising me that Judge Robb was upset by developments in the Vander Jagt case and instructing me, on Judge Robb's behalf, to immediately prepare for the two of us a majority opinion on the basis of "remedial discretion" and to advise Judge Bork to that effect. I was admonished to accomplish this task so that our final order could be issued before the end of the calendar year 1982.

I accomplished this task and the final order was signed by Robb and me on December 23, 1982, and the opinions were issued February 4, 1983, being delayed by the process of preparing a majority opinion and circulating it to Judges Robb and Bork. Judge Bork wrote anew his individual concurring opinion on "no standing" after receiving the majority opinion on "remedial discretion."

In sum, I now recall (a) Judge Bork's actions by way of changing his original position, unknown to Judge Robb and me; (b) Bork's delay in preparing his so-called majority opinion until late in 1982; (c) Bork's failure to dispatch his opinion with some explanatory cover letter; (d) my absence as the junior Judge in Kentucky; (3) Judge Robb's illness from cancer, from which he subsequently died; (f) the

creation of a "time of the essence" situation. These considerations give me grave reason to suspect that perhaps Judge Bork intended to have his narrow "no standing" view become the majority opinion of the Court and the law of the Circuit when, in fact, it was the minority opinion.

As a man who has been honored by appointment to and service as a Judge of the United States, I do not believe one who would resort to the actions toward his own colleagues and the majesty of the law as did Judge Bork in this instance, possesses those qualities of character, forthrightness and truthfulness necessary for those who would grace our highest Court.

Senator, you and your Committee may give this such weight as you wish, but I shall be forever convinced that there was a design and plan in Judge Bork's actions and activities. I apologize for the great length of this communication, but I could not conceive of any less lengthy way to give you the entire story for your consideration.

With highest personal respect and with every good wish, I remain,

Sincerely,

James F. Gordon
Senior United States
District Judge

JFG:gel

APPENDIX M

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

OCT 1 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I submit this letter in order to supplement my testimony before the Committee concerning my participation in Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983). I understand that the questions raised by the Committee concerning Vander Jagt arose from an August 24, 1987 letter to the Committee written by Senior District Judge James F. Gordon, a copy of which was provided me last week upon request.

I think the recollections of other persons involved, the contemporary documentation, and the practicalities of the situation all demonstrate that Judge Gordon's present recollection is incorrect. Moreover, I and other judges often discover in the course of preparing an opinion that "it will not write" and change the rationale or even the result. That is precisely what happened in Vander Jagt.

It may help to recount the events in Vander Jagt, as I and others remember them, because our recollection of these events differs significantly from Judge Gordon's. I have attached to this letter all the documents I have located in my files that concern the panel's deliberations in this case, and to which I will refer. As you can see from a review of these documents, I do not believe there is any basis for calling into question my actions in the Vander Jagt case. In addition, my recollection of these events is corroborated by my two law clerks who handled the case from beginning to end, Paul Larkin and John Harrison, and by Judge Robb's personal secretary, Ruth Luff. Ms. Luff's recall of these events was brought to my attention by Senior Judge MacKinnon, who called me after Judge Gordon's letter had been noted in the Washington Post. I have attached to this letter the declarations of Paul Larkin and John Harrison and the affidavit of Ruth Luff.

In Vander Jagt, several Republican Members of the House of Representatives filed suit alleging that House committee assignments by the Democratic majority impermissibly diluted the political influence of the Members and their constituents by assigning fewer seats on committees than their numbers would entitle them to proportionately. The district court dismissed

the suit on the grounds that the challenge was precluded by the Speech or Debate Clause and the political question doctrine.

On March 19, 1982, I sat on a panel with Circuit Judge Robb and District Judge Gordon, of the Western District of Kentucky, sitting by designation, and heard oral argument on the appeal. At conference following the argument, the panel agreed to affirm the district court, and Judge Robb, who was senior judge on the panel, assigned the writing of the opinion to me. Judge Robb's March 19 memo stated "[t]he opinion will assume that the plaintiffs have standing, but will conclude that they are out of court for numerous other reasons."

In the course of preparing the opinion, I came to the conclusion that the appeal should be decided instead on the ground that the plaintiffs lack standing to sue. I reached this view after a review of the Supreme Court's decision in the Valley Forge case, handed down just months before. Soon thereafter I visited Judge Robb in his chambers and discussed with him my view that the rationale for our decision to affirm the district court should change. Judge Robb agreed with this proposed change, and I returned to my chambers and informed my law clerk assigned to the case, Paul Larkin, of the substance of my discussion with Judge Robb. Both Paul Larkin and Judge Robb's secretary, Ruth Luff, remember this meeting.

On September 17, I sent to Judge Robb and Judge Gordon a draft opinion in the Vander Jagt case; my cover memorandum routinely indicated that I was disseminating the draft "for your review and comment."

(Judge Gordon incorrectly remembers that my draft was not sent to him until "the first part of November," and incorrectly adds that it came without a cover note. This is important, because Judge Robb was hospitalized in November, as Judge Gordon's letter indicates, but he was not hospitalized before then, when these events took place, at the time when Judge Gordon would have had reason to call Judge Robb. As the declaration of John Harrison suggests, what Judge Gordon now remembers as a conversation with another judge concerning this incident may well have concerned other aspects of the case, including perhaps whether Judge Robb would write a separate opinion or join in Judge Gordon's opinion.)

My draft opinion proposed to affirm the district court's dismissal for lack of standing, consistent with my discussion with Judge Robb. One week later I wrote Judge Gordon, apologized for failing expressly to notify him in advance of the change in rationale, and explained my standing rationale; I sent a copy of this letter to Judge Robb on October 1, who may not have received it immediately because he was on vacation in Massachusetts at the

time. I do not recall who or what prompted the September 24 letter to Judge Gordon.

To my great surprise, I received from Judge Robb in Falmouth, Massachusetts a memorandum to Judge Gordon and me dated October 5, in which Judge Robb expressed surprise at my draft opinion and disagreed with its rationale. Judge Robb wrote that he would apply the holding in the Riegle case, where the court determined a matter of its "equitable discretion" not to disturb the legislative decision. Judge Robb wrote "If Judge Gordon adheres to our reasoning and decision at conference, I suggest that he prepare an opinion along those lines. Judge Bork may of course write separately."

Although in his letter Judge Gordon states that at conference, the Riegle case and the equitable discretion doctrine were discussed, Judge Robb's memorandum the same day of argument does not mention that rationale as a basis for our decision. Moreover, I do not recall any mention of the Riegle rationale by Judge Robb or Judge Gordon at conference or at any time before Judge Robb's October 5 memorandum. My recollection that the Riegle rationale was not considered until Judge Robb's October 5 memorandum is supported by the two memoranda of Judge Robb in my files and my October 8 memorandum, discussed below, to which neither Judge Robb nor Judge Gordon objected. That memorandum shows that at our conference after the argument we agreed to put the case on either the Speech or Debate Clause or the political question doctrine.

I immediately wrote Judge Robb and Judge Gordon on October 8. I explained in full my standing rationale and recounted my earlier visit to Judge Robb's chambers, our discussion of the standing rationale, and Judge Robb's agreement with my proposed change in rationale. I readily acknowledged that "the confusion into which this case has been plunged" was the result of my failure immediately to apprise Judge Gordon of my discussion with Judge Robb when I disseminated my initial draft opinion September 17. I made no excuses; in fact the memorandum contains four separate apologies for this one oversight. I wrote, "Inexcusably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed." I informed the panel members that I would write a lengthier concurrence, one which would allow me fully to elaborate my thinking on the standing doctrine.

Thereafter, draft opinions by Judge Gordon and me were freely exchanged and comments were made on each other's drafts. I do not recall receiving any criticism from either Judge Robb or Judge Gordon at the time for changing my view of the case or even for failing to inform Judge Gordon right away of this change. Indeed, neither I nor my law clerk at the time, John Harrison,

recalls that the matter was ever brought up after my October 8 memorandum.

In my view, whatever misunderstanding there had been in the early fall of 1982 as a result of my failure to inform Judge Gordon of my change in rationale when I sent him my proposed draft was long ago cleared up to everyone's satisfaction. Upon reading the affidavit of Judge Robb's secretary, I now understand why Judge Gordon could have been upset at the time, because Judge Robb, forgetting our visit, may have told Judge Gordon that he could not have agreed to a change in rationale because I never discussed the matter with him. But I do believe that my memoranda of September 24 and October 8, coming just days after I sent out my draft opinion, fully explained the circumstances to Judge Gordon, and I had no reason to doubt-- in fact, I gave the matter no thought-- that he was satisfied by my explanation until his letter to the Committee nearly five years later.

Judge Gordon's present day recollection of the events in 1982 is all the more surprising after his final letter to me is considered. On December 17, 1982, Judge Gordon sent me his "final draft," and asked that I see to it that his opinion would be processed for publication. Judge Gordon concluded his letter to me with the following: "May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide season." This is hardly the sentiment of one who thinks an attempt to dupe him has just been made.

The appeal was decided eventually on February 4, 1983. Judge Robb joined in Judge Gordon's opinion, which affirmed the district court's dismissal on the "equitable discretion" rationale announced in the Riegle case. I wrote a concurring opinion concluding that the plaintiffs lacked standing to sue.

In his letter to the Committee, Judge Gordon states that he was "shocked" to receive my draft opinion. Yet I do not recall that Judge Gordon expressed to me, either at the time, 1982-1983, or at any time since, any displeasure with the panel's deliberative process, or specifically, my involvement in the case. And Judge Gordon does not indicate in his letter that he ever raised this matter with me directly, at the time or at any time since. Indeed, the tone of his December 17, 1982 letter to me is utterly at odds with Judge Gordon's August 24, 1987 letter to the Committee.

After reading for the first time Judge Gordon's letter to the Committee, I can understand why some members of the Committe raised questions. But I cannot help but conclude that, had Judge Gordon consulted the several documents that were sent to him by me and Judge Robb at the time, which I have attached to this

letter, he would not have written the August 24 letter to the Committee.

Apart from this detailed account of my recollection of the panel's deliberations in Vander Jagt, I am compelled to respond to Judge Gordon's accusation that I somehow intended to have my view on standing serve as the holding of the case and become the law of the circuit, without obtaining knowing concurrence of at least one other judge. As I indicated during my testimony, it is simply preposterous to suggest that I could or would have attempted any such thing. The record that is at my disposal, and which I submit to the Committee, in my view refutes any such idea. In particular, the discussion I had with Judge Robb, and the explanatory memoranda I wrote to Judge Robb and Judge Gordon belie this notion.

Of course, the very fact of sending a draft opinion to the other members of the panel, "for their review and comment," as I did in this case, is all that is often done on my court, and frankly, it is all that is or should be necessary. Not infrequently, I have received from other judges on my court draft opinions incorporating changes in rationale from that to which the panel had agreed at conference, and sometimes even a change in the result, without any separate explanation. And every opinion of the D.C. Circuit must circulate among all members of the court for a period of time before it may be issued. There is simply no possibility that any judge could change the law of the circuit surreptitiously. Even if that were possible, as it is not, the full court would simply grant the inevitable petition for rehearing en banc and put the law back in its prior position. Any judge who tried such a maneuver would certainly fail and would, moreover, forfeit forever the respect of his or her colleagues. The facts show that I attempted no such thing.

I hope this letter responds to any questions the Committee has concerning Judge Gordon's letter about the Vander Jagt case.

Sincerely,

Robert H. Bork

Robert H. Bork

Attachments

cc: Honorable Strom Thurmond

March 19, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

R.R.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb
Judge Gordon

FROM: Judge Bork

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: September 17, 1982

Attached is my proposed opinion in the above-mentioned case for your review and comment.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

September 24, 1982

The Honorable James F. Gordon
United States District Court
Western District of Kentucky
P.O. Box 435
Federal Building
Owensboro, Kentucky 42301

Re: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

Dear Judge Gordon:

It occurs to me too late that I should have notified you in advance that I had changed the rationale in the Vander Jagt case to one of lack of standing.

After I got started on the opinion, it became apparent that it was harder to dispose of the case under either the political question doctrine or the Speech or Debate Clause. The Supreme Court's opinion in Valley Forge, on the other hand, made it relatively easy to dispose of the case on the standing ground. This tack was also indicated because there are some en banc rehearings coming up in this circuit for which the other two grounds might have implications. That would have complicated the writing of the opinion based upon political question or Speech or Debate.

In any event, I regret not having apprised you of my thinking earlier in the process of writing.

Best wishes.

Sincerely,

Robert H. Bork

Robert H. Bork

RHB/hh

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

M E M O R A N D U M

TO: Judge Robb

FROM: Judge Bork

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: October 1, 1982

Attached is the letter I sent to Judge Gordon.

Falmouth, Mass.
October 5, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

My post-conference memorandum in this case said:

> At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

Now I am surprised to have Judge Bork's proposed opinion, holding that the plaintiffs are out of court because they have no standing to sue. Although I agree with the result I regret that I cannot concur in the opinion. I would apply the Riegle theory to this case. The Valley Forge case, relied on in the proposed opinion, was not a case of a congressional plaintiff, and I see nothing in it that suggests that the Court would not have approved the application of the Riegle theory in a congressional plaintiff context.

I think it can be argued here that in many ways plaintiffs have suffered injury. Although the proposed opinion says their votes have not been nullified, it is certainly true that the power or weight of their votes has been substantially diminished. I am not prepared to say that a plaintiff has standing to sue if his injury requires major surgery, but he will not be heard if he has suffered only bruises and contusions.

If Judge Gordon adheres to our reasoning and decision at conference, I suggest that he prepare an opinion along those lines. Judge Bork may of course write separately.

R.R.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb
Judge Gordon

FROM: Judge Bork RHB

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: October 8, 1982

Since my earlier failure to communicate is largely responsible for the confusion into which this case has been plunged, I think it advisable to set out my current thoughts about the case.

1. As explained in my prior memorandum, I think it easier to deal with this case on the standing doctrine than on the political question doctrine or the Speech or Debate Clause. That is true both for doctrinal reasons and because the latter two questions are much involved in a case we are to hear en banc later this month.

2. Having reached this conclusion in the course of preparing the opinion, I visited Judge Robb in his chambers and explained that I preferred to dispose of the case on standing grounds by returning to the complete-nullification-of-a-vote test adopted by the per curiam opinion in Goldwater v. Carter. I understood Judge Robb to agree to this strategy. Inexcusably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed.

3. Judge Robb suggests that Judge Gordon prepare an opinion affirming the district court on the basis of the circumscribed equitable discretion doctrine elaborated in Riegle. This is yet a fourth ground for affirmance and one not discussed at our conference. I do not object to it for that reason, however. Nor do I have any problem with the idea of turning my opinion into a concurrence.

4. I do not agree that the premise of Riegle can any longer be considered intact. The Supreme Court's Valley Forge decision unmistakably demonstrates that separation-of-powers concerns are to be implemented through the concept of standing. Valley Forge, which came after Riegle, is merely the latest in a long line of Supreme Court decisions which make that clear. I do not believe there is any significance in the fact that Valley Forge did not involve a congressional plaintiff. Indeed, separation-of-powers concerns are even stronger when the plaintiff is a congressman.

5. Assuming that Judge Gordon does prepare a majority opinion resting on the doctrine of circumscribed equitable discretion, I will feel free, as I did not when writing for the court, to express my views more fully. I think I should indicate now what those views are and how my concurring opinion is likely to differ from the present draft. I would, as mentioned above, point out that the decision in Valley Forge removes the foundation upon which Riegle rests. I would explain my reasons for thinking that the doctrine of circumscribed equitable discretion incorporates erroneous criteria and permits too many suits by legislators. I would, at a minimum, urge a return to the test of Goldwater v. Carter and would, probably, go on to suggest that Kennedy v. Sampson was wrongly decided and that there should be no such doctrine as legislator standing.

I mention these things now out of what may be an excess of caution bred of my failure to communicate fully earlier in the preparation of my opinion. In no sense do I wish to be understood as in any way displeased that one or both of you cannot agree with what I have written. I welcome the idea of writing a concurrence precisely because I will be able more freely to express what I think about this area of the law.

6. If there is any danger of mootness in this case, I do not think it could arise until January 3, 1983, when a new House of Representatives will come into existence. However, I do not think the case will become moot even then.

7. Despite my own failure in the past, I would appreciate learning as soon as Judge Gordon has decided whether the majority opinion is to rest on Riegle so that I can be ready with my concurrence and not delay the issuance of our decision.

I apologize to both of you for not making matters clearer as I went along.

United States District Court
FOR THE
Western District of Kentucky

Chambers of
James F. Gordon
Judge

Owensboro, Kentucky 42302

December 17, 1982

The Honorable Robert H. Bork
Judge, U. S. Court of Appeals
District of Columbia Circuit
3rd and Constitution Avenue, N.W.
Washington, D. C. 20001

RE: Vander Jagt v. Speaker O'Neill, No. 81-2150

Dear Judge Bork:

I have not as yet received your most recent re-write in the above-styled matter; however, in the interest of time, I enclose herewith two copies of the final draft of my opinion.

The final draft attached hereto contains some changes on pages 3 and 8 of the opinion and on Footnote pages 9, 10, and 11, plus the further fact I have rewritten the same so that it becomes now only my opinion as opposed to mine and Judge Robb's opinion.

Inasmuch as you are now, in Judge Robb's absence, the presiding Judge, I assume that you will see to the proper processing of my opinion through the Clerk's office there, and that there is nothing further for me to do. I would however appreciate it if you would have your law clerk give us a ring here when you have received this.

May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide Season.

Sincerely,

JAMES F. GORDON

JFG/ddt

Attachment

DECLARATION OF

PAUL J. LARKIN, JR.

I, Paul J. Larkin, Jr., being duly sworn, state:

1. I served as a law clerk to the Honorable Robert H. Bork, Circuit Judge for the United States Court of Appeals for the District of Columbia, from February 12, 1987, through August 13, 1982.

2. The following account is my current recollection of the events concerning the Judge's participation in the Vander Jagt v. O'Neill case, which was heard by Judge Robb, Judge Bork, and Judge Gordon.

3. At the conference following the oral argument in the case, Judge Bork was given the assignment of drafting the opinion for the panel. Judgment was to be entered in favor of the defendants, O'Neill et al. I believe that the panel's tentative rationale was to be that the plaintiff's claim presented a nonjusticiable political question. I remember that the rationale was not to be that the plaintiffs lacked standing.

4. Judge Bork decided to draft the opinion himself, rather than ask me to prepare a draft. After working on the opinion, Judge Bork concluded that the panel should rule instead that the plaintiffs lacked standing to sue. I believe that Judge Bork

concluded after reading the Supreme Court's January 1982 decision in the Valley Forge case that standing was the appropriate basis for disposing of the Vander Jagt case. Judge Bork told me that he would speak with Judge Robb about his new proposed rationale.

5. Judge Bork spoke with Judge Robb in Judge Robb's chambers about the standing rationale. Judge Bork spoke with me after he returned to chambers. Judge Bork told me that Judge Robb had agreed to dispose of the case on a standing basis, rather than on the rationale to which the panel had originally agreed.

6. I finished my clerkship in late summer. I was surprised when I received a copy of the opinion in the case, because Judge Bork's proposed opinion had become a separate concurrence, rather than the opinion for the court.

7. In my view, there is no foundation to the accusation that Judge Bork's conduct in this case was improper. I find it impossible to believe, and know of no evidence to support the claim, that he sought to take advantage of Judge Robb's illness and to "pull a fast one" on the other members of the panel or on the District of Columbia Circuit.

Paul J. Larkin, Jr.

Subscribed and sworn to me this 25th day of September, 1987.

District of Columbia

Notary Public Carol L. Miles

My Commission Expires August 14, 1990

DECLARATION OF JOHN HARRISON

1. I was a law clerk to Judge Robert Bork, U.S. Circuit Judge for the District of Columbia Circuit, from August of 1982 to August of 1983. During that period I was the clerk primarily responsible for the case of Vander Jagt v. O'Neill, a responsibility I took over from Paul Larkin.

2. My recollection of the events concerning Vander Jagt and their order is not perfect, but I do recall what happened with the case and have several specific recollections.

3. As Judge Bork's files reflect, he circulated his draft panel opinion in the case on September 17, 1982. The cover memo did not mention that the rationale was standing rather than political question or the Speech or Debate Clause. A week later, Judge Bork wrote a letter to Judge Gordon in which he explained the change of rationale and apologized for not having discussed the matter with Judge Gordon earlier. Although I do not remember the specific dates, I do remember circulating the first draft of Vander Jagt and I do remember Judge Bork writing the letter to Judge Gordon.

4. I also remember Judge Bork remarking on (1) his conversation with Judge Robb in which they discussed the new rationale and (2) the fact that Judge Robb later did not remember the conversation. Judge Bork said that another of the judges on the court had spoken of a similar problem with Judge Robb. I think that Judge Bork talked about this after receiving Judge Robb's memo of October 5, but I am not certain.

5. After he decided not to go along with the standing argument, Judge Robb asked Judge Gordon to write an opinion for the two of them based on equitable discretion. That ground of decision is not mentioned in Judge Robb's conference memo of March 19, as Judge Bork noted in his memo of October 8.

6. I specifically remember Judge Bork drafting the October 8 memo. In particular, I recall his expression of regret about the confusion into which the case had been thrown as a result of his failure properly to communicate with Judge Gordon. Judge Bork seemed quite upset with himself for not having called Judge Gordon at the time he talked to Judge Robb about the change in rationale.

7. Our chambers exchanged drafts with Judge Gordon's so that we could comment on one another's work. I discussed the case at some length with Judge Gordon's clerk and do not remember the change of rationale as a source of any friction between the clerks.

8. On at least one occasion, Judge Robb's wishes in the case were communicated to Judge Bork through Judge Wilkey. My recollection is that Judge Wilkey told Judge Bork that Judge Robb had decided to join Judge Gordon's opinion; earlier, Judge Robb had planned to issue a short statement of his own saying simply that he thought the case should be disposed of under the equitable discretion doctrine.

9. Based on my experience as a law clerk on the D.C. Circuit, the implication that Judge Bork hoped somehow to mislead the other members of the panel by changing his ground of decision without telling them is implausible. A judge could hope to do this only if he believed that no one else would read his draft.

John Harrison

Subscribed and sworn to me this 28th day of September, 1987.

STATE OF: District of Columbia

My Commission Expires August 14, 1989

Carol L. Miles/Notary Public

AFFIDAVIT OF RUTH LUFF

I, Ruth Luff, being duly sworn on oath, state:

1. I served as personal secretary to Judge Roger Robb, Circuit Judge on the U.S. Court of Appeals for the District of Columbia, from his appointment in 1969 to June 1983 after Judge Robb assumed senior status.

2. The following account is my recollection of the events concerning Judge Robb's involvement in Vander Jagt v. O'Neill, a case heard by Judge Robb, Judge Bork and Judge Gordon in March 1982 and decided by the court of appeals in February 1983 in an opinion by Judge Gordon joined in by Judge Robb.

3. I was contacted several days ago by Tony Fisher, the Clerk of the U.S. Court of Appeals for the District of Columbia, who had been approached by someone from the Senate Judiciary Committee. I was told that the Committee wished to interview me. A staff person from the Committee called me later but did not mention the Vander Jagt case. He asked me about certain people and I told him I no longer maintained close contact with anyone from the court, and probably could not answer any of his questions. I mentioned that I was busy with a new career. At that point he thanked me and the conversation ended.

4. After I read the article in the Washington Post, concerning Judge Gordon and the Vander Jagt case, my memory was refreshed and I recalled the case and many of the circumstances surrounding it.

5. I recall specifically that Judge Bork visited Judge Robb in his chambers on this case after the case was heard, because Judge Robb asked me to locate the file on the case and give it to him. Although I cannot remember precisely when this meeting took place, I believe it was in the spring of 1982.

6. I remember that at one point later, perhaps in October 1982, Judge Gordon called Judge Robb, and I got the impression that Judge Gordon was upset by something Judge Bork had written. After Judge Robb ended his conversation with Judge Gordon, he made a critical remark about Judge Bork to me, and said something to the effect of "He never came to see me, and he never let Judge Gordon know." Judge Robb apparently did not recall his meeting with Judge Bork and apparently had told Judge Gordon that. Although I knew that Judge Bork had seen Judge Robb on this case, I did not mention it at the time. I remember Judge Bork's visit to Judge Robb on this case because of the controversy that ensued after this telephone call.

7. It is not surprising that Judge Robb did not recall his meeting with Judge Bork, because Judge Robb was going through a difficult period at this time and shortly thereafter went into the hospital.

8. I do not understand all the attention this case has received. The exchange of draft opinions between judges, sometimes incorporating different rationales than that to which the panel members had initially agreed at conference, is common practice. I do not recall any hard feelings among judges in the past in any case in which this practice occurred.

9. I am making this statement because I believe that, based on my memory of the events, the accusations of improper conduct by Judge Bork are unfounded and unfair, and the questions about Judge Bork's integrity caused by this matter deserve to be put to rest.

Ruth Luff

District of Columbia

Subscribed and sworn to me this 25th day of September, 1987.

Notary Public Carol L. Miles

My Commission [illegible]

APPENDIX N

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

October 5, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I submit this letter in answer to questions from Senator Robert C. Byrd dated October 1, 1987.

I want to thank you for this opportunity to respond to the frustrating inaccuracies and outright distortions concerning my opinion for a unanimous court in Oil, Chemical and Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984). Neither then-Judge Scalia nor Senior District Judge Williams nor myself, ever "endorsed" or "approved of" an employer's policy of requiring women to undergo sterilization as a condition of employment. In what can only be described as a heart-wrenching case, we were asked to construe a statute which simply did not cover the company policy before us. As your letter points out, we specifically noted that the company's action might have constituted an "unfair labor practice" under the National Labor Relations Act or a forbidden sex discrimination under Title VII of the Civil Rights Act. See 741 F.2d at 450 n.1. Before I respond to your specific questions, I would like to put the case in its proper factual perspective.

In 1978, American Cyanamid determined that it could not reduce lead levels in the lead pigment department of one of its plants to a level that would be safe for the fetuses of pregnant workers. The Occupational Safety and Health Administration ("OSHA") has taken the position that the Occupational Safety and Health Act (the "Act") requires employers to protect employees from harm to their fetuses, and the Court of Appeals for the District of Columbia Circuit has said that OSHA has authority to impose this requirement. United Steelworkers of America v. Marshall, 647 F.2d 1189, 1256 n.96 (D.C. Cir.), cert. denied, 453 U.S. 913 (1981).

Accordingly, the employer adopted a policy that only sterile women (or women past childbearing age) would be employed in this department. The employer informed the women who worked in the department of this policy, and of the availability of surgical sterilization as a way of complying with that policy. Faced with loss of their jobs or with transfer to lower-paying jobs, five of the women elected surgical sterilization in 1978. Subsequently, the women and their union brought a Title VII suit alleging that the sterilization policy constituted sex discriminaton, and raising state law claims for intentional infliction of emotional harm and invasion of privacy. A federal district court dismissed the state law claims as barred by the state statute of limitations, Christman v. American Cyanamid Co., 578 F. Supp. 63 (N.D. W. Va. 1983), and the employer eventually settled the Title VII suit with the women and their union.

The litigation at issue commenced when OSHA issued a citation to the employer seeking a fine of $10,000 on the grounds that the employer's policy exposed the women to "recognized hazards" in violation of the Act. The Occupational Safety and Health Review Commission ("OSHRC") rejected OSHA's contention that the employer's policy constituted a "hazard" within the meaning of this particular statute. The Secretary of Labor could have petitioned the Court of Appeals for review of the Commission's decision on behalf of OSHA, but the Secretary declined to do so. The appeal was brought instead by the union as an intervenor. The Secretary of Labor did not file a brief.

When the case came before me and my colleagues in 1983, the situation was this: the women had undergone sterilization some five years previously, and there was no prospect that any other women would be subjected to that policy. The sterilized women had obtained a favorable settlement of their Title VII suit. All that was at issue, from a practical standpoint, was whether the employer would have to pay a $10,000 fine to the federal government. And all that was at issue from a legal standpoint was whether the employer's policy violated the Act -- not whether that policy violated other federal or state law.

Cognizant of the gravity of the harm these women had suffered, my colleagues and I carefully examined every legal and factual point in the case. As to the lead levels in the Cyanamid pigments department, we had before us the finding of an Administrative Law Judge ("ALJ") indicating that it was economically infeasible to reduce the lead content of the air in the plant. For this reason, the ALJ had vacated an earlier OSHA complaint against American Cyanamid based on lead exposure itself.

We also scrutinized the history of OSHA's lead standard for the pigment industry. In 1978, OSHA issued new rules designed to protect workers from exposure to airborne lead in the workplace. The rules were reviewed by the Court of Appeals in a lengthy opinion written by Judge J. Skelly Wright. See United States Steelworkers, 647 F.2d 1189.

For the lead pigment industry, the new OSHA rules required employers to reduce lead levels to 100 micrograms of lead per cubic meter of air within three years, and finally to achieve a level of 50 micrograms per cubic meter of air within five years. Judge Skelly Wright's opinion vacated the new OSHA rules, holding that, "OSHA has not presented substantial evidence for the technological feasibility of the standard for this industry." Id. 1294. Even if lead levels could have been reduced to the lowest proposed OSHA standard, the agency's own medical data indicated that almost one-third of women in the pigment industry would still have ingested enough lead to cause fetal damage. Id. 1250-57. The Supreme Court declined to review Judge Wright's conclusions. See 453 U.S. 913 (1981). After considering these precedents, my colleagues and I concluded that we were dealing with an industry which simply could not be made safe for fertile women.

Faced with the physical impossibility of lowering lead levels, the company had several alternatives. It was clear that the company could not have been charged under the Act if it had closed down the entire department or discharged all thirty female employees. Moreover, the union conceded at oral argument in the case that the company could have lawfully stated that "only sterile women" would be employed in the department. See 741 F.2d at 449-50. In sum, the union's objection boiled down to the fact that the employer "pointed out the option and provided information about it." Id. at 450. Thus, the precise legal issue presented for our review was a narrow one: Did Cyanamid's policy of advising women of the option of sterilization constitute a breach of its duty under the Act to "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injury . . . ." 29 U.S.C. § 654(a)(1) (1982).

It should be emphasized that we did not confront this issue on a clean slate. The ALJ and the OSHRC, both expert in the area of employment safety law, had found that Cyanamid's policy did not constitute a "recognized hazard" under the Act. During the pre-hearing conference in the case, the ALJ told the parties:

> The thing[] that's hit my eye about this whole case, I think we're under the wrong law here. I really do. I don't see where Congress had any thought whatever in passing the OSHA Act in treating the female as opposed to the male segment of the working force.
>
> They were talking about employees across the board. Now, if the Secretary can make out a discrimination case, he's not going to make it out under the OSHA Act. There's a law that covers this, and it's not the Occupational Safety and Health Act.
>
> Now again, it would seem to me that we are operating under the wrong law here. There is the National Labor Relations Act and other labor laws to prevent employers from engaging in unfair labor practices. This is perhaps a matter of collective bargaining.
>
> And your view is that the recognized hazard is a sterilization. And you have got a really difficult burden, Mr. Berger [counsel for the Secretary]. Because I have seen nothing in the law, in the legislative history or of any case decided under section 5A1, that could be convoluted to include sterilization under the situation that we face here as a recognized hazard. No way.

The ALJ subsequently dismissed the claim, and the OSHRC affirmed that decision, stating:

> [I]t is clear that Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities.
>
> The fetus protection policy is of a different character altogether. It is neither a work process nor a work material, and it manifestly cannot alter the physical integrity of employees while they are engaged in work or work-related activities. An employee's decision to undergo sterilization in order to gain or retain employment grows out of economic and social

> factors which operate primarily outside the workplace. The employer neither controls nor creates these factors as he creates or controls work processes and materials. For these reasons we conclude that the policy is not a hazard within the meaning of the general duty clause.

American Cyanamid Co., 9 O.S.H. Cas. (BNA) 1596, 1600 (1981) (footnote omitted).

Our own independent review of the text and legislative history of the OSHA Act confirmed the conclusions reached by the ALJ and the OSHRC. In the Preamble to the Act, Congress refers to "personal injuries and illnesses arising out of work situations" and "safe and healthful working conditions." See 29 U.S.C. §§ 651(a) & (b) (1982). In discussing the very provision at issue in the Cyanamid case, the Senate Report states "[e]mployers have primary control of the work environment and should insure that it is safe and healthful." S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970), 10 reprinted in 1970 U.S. Code Cong. & Ad. News 5186 (emphasis added). The Report lists a host of work hazards that the Act was designed to address; all of them involve physical dangers in the workplace itself. See id. at 2-4; 5178-79 (listing such hazards as carcinogenic chemicals, lasers, ultrasonic energy, beryllium metal, epoxy resins, pesticides, etc.). My colleagues and I reviewed this history carefully, and concluded that the OSHRC was correct in not extending the Act to Cyanamid's policy of providing information concerning the option for medical sterilization in a facility unconnected with the company.

As I noted in my opinion, this conclusion was further supported by the Supreme Court's decision in Corning Glass Workers v. Brennan, 417 U.S. 188 (1974). There, in interpreting the phrase "working conditions" in the Equal Pay Act, the Court looked to "the language of industrial relations." Id. at 202. The Court found that the phrase was limited to workplace "surroundings" and "hazards" and did not cover differences between day and night shifts. Id. Both the Fourth and Fifth Circuits had applied the Supreme Court's reasoning in Corning Glass to the OSHA Act, holding that its coverage was limited to physical hazards in the work environment. See Southern Pacific Transportation Co. v. Usery, 539 F.2d 386, 390 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); Southern Railway Co. v. OSHRC, 539 F.2d 335 (4th Cir.), cert. denied, 429 U.S. 999 (1976).

Thus, the evidence before us overwhelmingly indicated that Congress intended to limit the scope of the Act to "recognized hazards" in the environment of the workplace. As I stated in my opinion, [t]he women involved in this matter were put to a most unhappy choice." 741 F.2d at 450. But to hold that a policy providing such a choice was a work hazard under the Act would have run directly counter to congressional intent, Supreme Court precedent, the considered judgment of two other federal circuits and the specific findings of the ALJ and the OSHRC. We were powerless to aid these women based on the statute upon which the union sued -- we could award neither damages, nor back-pay, nor alternative employment to them. The best we could do was issue a warning to Cyanamid and other employers, that:

> The case might be different if American Cyanamid had offered the choice of sterilization in an attempt to pass on to its employees the cost of maintaining a circumambient lead concentration higher than permitted by law.

741 F.2d at 450.

In short, the case presented was very narrow in scope, both as a legal and factual matter. These women had already chosen the sterilization procedure and the plant had already been closed even before I became a member of the appellate court. There was no legal claim in our court seeking to modify or develop alternatives to the company policy by way of injunctive relief or compensatory damages. Neither of the relevant laws dealing with employment policies -- Title VII and the NLRA -- were before us. The only statute at issue was a law that allowed for fines in response to actual safety hazards in the workplace. As the legislative history, administrative agency interpretation and precedent from the Supreme Court and other appellate courts, demonstrated, the OSHA statute simply did not apply to employment policies. Thus, any suggestion that Justice Scalia, Judge Williams or I failed to prevent or failed to remedy the trauma suffered by these women is false, misleading and most unfair. One might just as easily level such a charge against Judge Wright who decided the lead standard case, or the Supreme Court which declined to review his decision.

Having set out that important background, let me turn now to any of your specific questions which I may have left unanswered.

1. In a footnote to your opinion and in your testimony before the Judiciary Committee, you referred to the fact that the petitioners had brought another case under Title VII of the Civil Rights Act of 1964, which they had settled with the company.

(a) Did the fact that you had been told of this settlement affect your decision in the case before you?

(b) If so, how?

(c) If not, why not?

1. No, the existence and settlement of this particular Title VII suit did not affect my decision. As a judge, my duty is to consider the law and facts before me, not the outcome of prior litigation between the parties. As I stated above, however, since Title VII prohibits employment policies that discriminate as the basis of sex and pregnancy, it more directly governed the situation faced by the women employees than did the OSHA Act. Moreover, if liability were established, backpay and reinstatement would be available under Title VII, to women in a situation like this one. These remedies are not in any way available under the OSHA Act.

2. In your opinion you wrote that "Congress may be presumed to have legislated about industrial relations 'with the language of industrial relations' in mind." Considering your stated philosophy of judicial restraint and deference to the will of the Congress:

(a) Why did you presume that Congress intended to have the plain words of the statute read under the language of industrial relations, rather than that they be given their ordinary meaning?

(b) What research, if any, did you do to determine the actual intent of Congress in its use of the statutory language?

(c) If you did research the actual intent of Congress with respect to its use of the statutory language, what was the result of such research?

2(a). In so doing, I was following a rule well-established by Supreme Court precedent. In the Corning Glass case, cited in my opinion, the Supreme Court stated:

> where Congress has used technical words or terms of art, 'it [is] proper to explain them by reference to the art or science to which they are appropriate.' Greenleaf v. Goodrich, 101 U.S., 278, 284 (1880) . . . .
>
> While a layman might well assume that time of day worked reflects one aspect of a job's 'working conditions,' the term has a different and much more specific meaning in the language of industrial relations.

417 U.S. at 201-202. This rule is in full conformity with a theory of judicial restraint and deference to Congressional will. Where Congress deliberately uses a well-defined term of art, it would flout Congressional will to give the term dictionary meaning out of its special context.

I believe I have substantially responded to questions (b) and (c) in the body of my letter. As I indicated there, my review of the language and history of the OSHA Act was quite thorough, and uniformly supported the conclusions reached by the ALJ, OSHRC and other courts of appeals.

3. On Friday, September 18, you testified that "the company did not achieve safety at the expense of women." Considering that five women were sterilized and can never have children, please explain why you consider that safety was not achieved "at the expense of women."

3. I think my remarks have been taken somewhat out of context. In no way did I intend to denigrate the suffering of these women. I was referring to the fact that it was not only economically but technologically infeasible for the company to lower lead levels. Thus the company was not passing off safety costs to its employees to save money. As I stated in my opinion, if this had been the situation, we would have had a quite different case.

4. On Friday, September 18, in referring to the five women who were sterilized in order to retain their jobs at the plant, you testified: "I suppose that they were glad to have the choice -- they apparently were -- that the company gave them." Later that same day, the Committee received a telegram from one

of the women, which read in part: "I cannot believe that Judge Bork thinks we were glad to have the choice of getting sterilized or being fired. Only a judge who knows nothing about women who need to work could say that. I was only 26 years old, but I had to work, so I had no choice."

(a) What evidence led you to assume that the petitioners were apparently glad to have had the choice?

(b) Was information, such as that contained in the telegram, to the effect that the plaintiffs may not have considered themselves as having had a realistic choice, presented to you in the course of the consideration of the case?

4. I obviously was not suggesting that anyone would be glad to choose between continued employment and sterilization. In my opinion I emphasized that the women faced a "distressing" and "most unhappy choice." However, given the technological infeasibility of eliminating the health threat to fetuses, the child-bearing women could not have been safely employed in the pigment plant -- thus creating this distressing situation. I'm quite sure everyone involved was most disturbed about this technological reality and the unhappy choices it engendered.

My statement refers only to the fact that the Company could have, without violating the OSHA Act, closed the plant or fired all the women without consulting with them in any way. In this way, the company alone would have decided the employment future of these women. Although the choice presented was a horrible one, the company did attempt to allow these women some control over their own destiny. While that may not have been the best policy for the company to pursue, the act of enhancing the women's options cannot in and of itself, be viewed as a violation of OSHA.

5. On Saturday, September 19, you testified that "Our court did not endorse the policy of the company." You then quoted extensively from your opinion, discussing the company's policy in detail. If your statements both in the opinion and to the Committee did not constitute an endorsement of the company's policy, do you believe that they constitute a defense of the policy? Please explain.

5. I have never, in my opinion for the court or before your Committee "endorsed" or "defended" this policy. My duty as a judge was to decide whether or not this policy constituted a "recognized hazard" under the OSHA Act. Given the language and history of that Act I could not in good conscience come to the conclusion that a violation had occurred. I specifically indicated that I thought the policy may have violated two other federal statutes which were not before me. On a personal level, I thought that the company demonstrated serious insensitivity, although perhaps in a misguided effort to allow some women to keep their jobs.

6(a). In hearing the case, did you consider or inquire whether the company could have made efforts other than sterilization to assist the women in maintaining their standard of living, including but not limited to: offering them jobs of equal pay at another plant, offering them retraining for jobs of equal or higher pay, offering them severance pay and assistance in obtaining jobs at similar pay elsewhere, etc.?

(b). If you did not consider or inquire about such other options, please explain why not.

(c). If you did consider or inquire about such other options, did you consider remanding the case? Please explain.

6. Unfortunately, the Supreme Court has made it clear that under the OSHA Act neither a court nor the agency has the power to order severance pay, damages, or any other economic remedy. In American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981), the Court struck down a provision of OSHA's cotton dust standard which guaranteed the wages and other employment benefits of employees transferred out of the workplace because of their inability to wear a respirator. Justice Brennan left no doubt about the limitations on the Act, when he wrote:

> Congress gave OSHA the responsibility to protect worker health and safety, and to explain its reasons for its actions. Because the Act in no way authorizes OSHA to repair general unfairness to employees that is unrelated to achievement of health, and safety, we conclude that OSHA acted beyond statutory authority when it issued the wage guarantee regulation.

452 U.S. at 540. Again Senator, our power to help these women was severely limited by the statute under which the union sued. As the ALJ put it, the OSHA Act was simply the "wrong law" for this case.

7. In your opinion, you quoted from 43 Federal Register 54, 422 (1978) that OSHA's lead standard states the agency's belief that "the fetus is at risk from exposure to lead throughout the gestation period." In considering the case, what information, if any, did you have that the exposure to lead could adversely effect the reproductive abilities of both men and women.

7. As I understand it, in its rulemaking process, OSHA heard testimony that lead levels also affected male fertility. See 43 Fed. Reg. 54,388-92 (1978). Although the effects on males were not as firmly documented as those on females, one study suggested that male exposure to high lead levels could have negative effects on sperm potency and male sex drive. This evidence, although highly relevant to a sex discrimination action, was not relevant to defining a "recognized hazard" under the OSHA Act. For this reason, the information did not receive significant discussion in the briefs or oral argument in the case before us.

I believe that both OSHA and the Equal Employment Opportunity Commission ("EEOC") had previously taken the position that the exclusion of females from this type of employment presented sex discrimination issues, not worker safety concerns. Thus, in the context of lead exposure, OSHA referred to this evidence as presenting "equal employment opportunity considerations." See 48 Fed. Reg. 52,960 (1978). In a "Statement on Hazardous Substances and Equal Opportunity" issued in 1978, the EEOC stated:

> EEOC will continue the vigorous enforcement of Title VII as to all employment practices or policies that unlawfully exclude women of childbearing capacity and any other person from the workplace or otherwise adversely affect the economic opportunities of any individuals protected by Title VII.

Again the OSHA Act was simply the wrong statute under which to address the possibility of discriminatory exclusion of women from the lead pigment plant.

8. Before deciding the case, what information, if any, did you have as to whether:

(a) the Inorganic Pigments Department of the plant, in which the petitioners had been employed, was still in operation;

(b) any of the petitioners were no longer employed at the plant.

8. As best I can recall, the record revealed that the plant was closed in January of 1980 and perforce none of the petitioners were employed there at the time the appeal was heard.

Sincerely,

Robert H. Bork

Robert H. Bork

RHB/cah

cc: Senator Robert C. Byrd
Senator Strom Thurmond

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Committee on the Judiciary
United States Senate

Hearings on the Nomination of
Judge Robert H. Bork
to be Associate Justice of the
United States Supreme Court

Witness List

Tuesday, September 15, 1987

The Honorable Gerald R. Ford
Former President of the United States

The Honorable Bob Dole
U.S. Senator from the State of Kansas

The Honorable John C. Danforth
U.S. Senator from the State of Missouri

The Honorable Hamilton Fish, Jr.
U.S. Congressman from the State of New York

The Honorable Robert H. Bork
U.S. Circuit Court Judge for the District of Columbia Circuit

Wednesday, September 16, 1987

The Honorable Robert H. Bork
U.S. Circuit Court Judge for the District of Columbia Circuit

Thursday, September 17, 1987

The Honorable Robert H. Bork
U.S. Circuit Court Judge for the District of Columbia Circuit

Friday, September 18, 1987

The Honorable Robert H. Bork
U.S. Circuit Court Judge for the District of Columbia Circuit

Saturday, September 19, 1987

The Honorable Robert H. Bork
U.S. Circuit Court Judge for the District of Columbia Circuit

Monday, September 21, 1987

William T. Coleman
Partner, O'Melveny & Myers;
Former Secretary of Transportation;
Chairman of the Board, NAACP
Legal Defense and Educational Fund, Inc.

Barbara Jordan
Professor, University of Texas, Austin;
Former Member of Congress; Former Member Texas Senate

Andrew Young
Mayor, Atlanta, Georgia; Former Member of Congress

Burke Marshall
Professor, Yale University Law School;
Former Assistant Attorney General Civil Rights Division;
Former Vice President and General Counsel, IBM

Edward H. Levi
Former Attorney General

William French Smith
Former Attorney General

Nicholas deB. Katzenbach
Former Attorney General

William Rogers
Former Attorney General

American Bar Association

Harold R. Tyler, Jr.
Chairman, Standing Committee on Federal Judiciary
of the American Bar Association

Robert B. Fiske, Jr.
Former Chairman, Standing Committee on Federal
Judiciary of the American Bar Association

Tuesday, September 22, 1987

Laurence H. Tribe
Professor of Constitutional Law, Harvard Law School

Panel

Carla A. Hills
Former Secretary of Housing and Urban Development

Michael McConnell
Professor, University of Chicago School of Law

Thomas Campbell
Professor, Stanford Law School

Richard Stewart
Professor, Harvard Law School

Gary Born
Adjunct Professor of Law, University of Arizona

First Amendment Panel

Lee Bollinger
Dean, University of Michigan Law School

William Styron
Author

Robert Rauschenberg
Artist

Law Enforcement Panel

Donald Baldwin
Executive Director, National Law Enforcement Council

Dewey Stokes
President, Fraternal Order of Police

Jerald R. Vaughn
Executive Director, International Association of Chiefs of Police

John J. Bellizzi
Executive Director, International Narcotics Association of Police Organizations

John L. Hughes
Director, National Troopers Coalition

Cary Bittick
Executive Director, National Sheriffs Association

Wednesday, September 23, 1987

The Honorable Warren E. Burger
Former Chief Justice, United States Supreme Court

Panel

John Hope Franklin
Professor of History, Duke University

William Leuchtenburg
Professor of History, University of North Carolina

Walter Dellinger
Professor, Duke University Law School

Lloyd N. Cutler
Partner, Wilmer, Cutler & Pickering;
Counsel to President Carter

Panel

Governor James Thompson
Governor of Illinois

John P. Frank
Attorney at Law, Phoenix, Arizona

Fred L. Foreman
District Attorney of Lake County, Illinois
President-Elect of the National District
Attorneys Association

Friday, September 25, 1987

Bar Leaders Panel

Chesterfield Smith
Partner, Holland & Knight;
Former President of the ABA

Robert W. Meserve
Counsel, Palmer & Dodge;
Former President of the ABA

Robert Kaufman
Partner, Proskauer, Rose, Goetz & Mendelsohn;
President of the Association of the Bar of
the City of New York

Sheila Birnbaum
Partner, Skadden, Arps, Slate, Meagher & Flom;
Vice President of the Association of the Bar of
the City of New York

Thomas Sowell
Fellow, Hoover Institute

Equal Protection Panel

Shirley M. Hufstedler
Partner, Hufstedler, Miller, Carlson & Beardsley;
Former Secretary of Education;
Former Judge, 9th Circuit Court of Appeals

Barbara Babcock
Professor, Stanford Law School

Sylvia Law
Professor, New York University Law School

Wendy Williams
Professor, Georgetown University Law Center

Academic Panel

Forrest McDonald
Professor of History, University of Alabama

Daniel Meador
Professor, University of Virginia Law School

George Priest
Professor, Yale University Law School

John G. Simon
Professor, Yale University Law School

Ronald Rotunda
Professor, University of Illinois Law School

Academic Panel

Robert Bennett
Dean, Northwestern University Law School

Paul Gewirtz
Professor, Yale University Law School

Owen Fiss
Alexander Bickel Professor of Public Law,
Yale University Law School

Thomas Grey
Professor, Stanford University Law School

Judith Resnik
Professor, University of Southern California Law School

Bar Leaders Panel

Charles S. Rhyne
Former President, American Bar Association

John C. Shepherd
Partner, Shepherd, Sandberg & Phoenix, St. Louis, Missouri
Former President American Bar Association

Wallace O. Riley
Partner, Riley & Rounell, Detroit, Michigan
Former President American Bar Association

James T. Bland, Jr.
President, Federal Bar Association

Monday, September 28, 1987

Executive Power Panel

Senator Thomas Eagleton

Cass Sunstein
Professor, University of Chicago Law School

Griffin B. Bell
Former Attorney General

Philip Kurland
Professor, University of Chicago Law School

Justice Department Colleagues Panel

Governor Richard Thornburgh
Former United States Attorney

A. Raymond Randolph
Former Deputy Solicitor General

Stuart Smith
Former Deputy Solicitor General

Jewel LaFontant
Former Deputy Solicitor General

Academic Panel

Paul Bator
Professor, University of Chicago Law School

Henry Monaghan
Professor, Columbia University School of Law

Lillian Riemer BeVier
Professor, University of Virginia School of Law

A. Leo Levin
Professor, University of Pennsylvania Law School

Dallin H. Oaks
Former Professor, University of Chicago Law School;
Former Justice, Utah Supreme Court

Lawyers Panel

Howard G. Krane
Partner, Kirland & Ellis, Chicago

George Reed Carlock
Partner, Ryley, Carlock & Applewhite, Phoenix, Arizona

Reverend Kenneth Dean
First Baptist Church, Rochester, N.Y.

Tuesday, September 29, 1987

Privacy Panel

Herma Hill Kay
Professor, Boalt Hall Law School, University of California, Berkeley

Kathleen Sullivan
Professor, Harvard Law School

David Richards
Professor, New York University Law School

Elliot L. Richardson
Partner, Milbank, Tweed, Hadley & McCloy, New York;
Former Attorney General

Congressional Black Caucus Panel

The Honorable Mervyn Dymally
U.S. Representative from the State of California

The Honorable John Conyers, Jr.
U.S. Representative from the State of Michigan

The Honorable Walter E. Fauntroy
Delegate from the District of Columbia

Watergate Panel

Henry Ruth
Counsel, UNISYS;
Former Deputy Watergate Special Prosecutor

George Frampton
President, The Wilderness Society;
Former Assistant Watergate Special Prosecutor

Law School Deans Panel

Terrance Sandalow
Former Dean, University of Michigan Law School

Steven Frankino
Dean, Villanova Law School; Former Dean,
Catholic University Law School

Maurice Holland
Dean, University of Oregon School of Law

Ronald Davenport
Former Dean, Duquesne Law School

Eugene Rostow
Professor Emeritus, Former Dean, Yale Law School

Thomas Morgan
Dean, Emory University Law School

Gerhard Casper
Former Dean, University of Chicago Law School

Antitrust Panel

Phillip Areeda
Professor, Harvard Law School

Thomas Kauper
Professor, University of Michigan Law School;
Former Assistant Attorney General, Antitrust Division

Donald I. Baker
Sutherland Asbill & Brennan, Washington, D.C.;
Former Assitant Attorney General, Antitrust Division

James T. Halverson
Partner, Shearman & Sterling, New York;
Former Director, Federal Trade Commission
Bureau of Competition

Wednesday, September 30, 1987

Antitrust Panel

Robert Abrams
Attorney General, New York

Robert Pitofsky
Dean, Georgetown University Law Center

Charles Brown
Attorney General, West Virginia

Beverly LaHaye
Concerned Women for America

Vilma S. Martinez
Partner, Munger Tolles & Olsen, Los Angeles

Rabbi William Handler
Union of Orthodox Rabbis of the
United States and Canada

Panel

John Clay
Mayer, Brown & Platt, Chicago;
Lawyers for the Judiciary

John C. Roberts
Dean, DePaul University College of Law;
Lawyers for the Judiciary

John W. Boley
Mayer, Brown & Platt, Chicago
Lawyers for the Judiciary

Roy Innis
Congress of Racial Equality

Small Business Panel

Dmitri G. Daskal
Counsel, Service Station Dealers of America;
The Pocketbook Coalition

Albert A. Foer
President, Melart Jewelers

Herbert Brownell
Former Attorney General

Law Enforcement Panel

Harold Johnson
National Organization of Black Law Enforcement Executives

Robert Kliemet
International Union of Police Associations

Ronald Hampton
National Black Police Association